80-893

Supreme Court, U. S.
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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

GLENN P. KIRKLAND, ET AL., *Petitioners*

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN CONFERENCE OF TEAMSTERS and CENTRAL STATES CONFERENCE OF TEAMSTERS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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December 2, 1980

QUESTIONS PRESENTED

1. Whether uncertainty as to the amount of damages suffered by an injured plaintiff is a basis for denying all relief to the plaintiff in suits brought under §301 [a]of the Labor-Management Relations Act of 1947, 29 USC §185 [a], where the wrongdoing is of a type that precludes the ascertainment of the amount of damages with certainty.

2. Whether the lack of a comparison between damages brought about by wrongdoing and damages which might have been suffered had the wrongdoing not occurred is a sufficient basis to relieve a wrongdoer from making amends to the injured persons in suits brought under 29 USC §185 [a].

3. Whether Plaintiffs/employees in suits brought under 29 USC §185 [a], once they have proven liability and the existence of damages, must also, as part of their case-in-chief, bear the burden of disproving the Defendants' defenses.

4. Whether the Court below inproperly shifted the burden of proving affirmative defenses to Plaintiffs, requiring them to disprove defenses.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on August 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals, which appears in the Appendix hereto, is reported at 629 F2d 538 [8th Cir. 1980]. The opinion of the District Court, which also appears in the Appendix hereto, is reported at 475 F. Supp. 180 [ED. Ark. 1979].

[1]The following is a list of all parties:

Petitioners:
Keith Alsip; Thurman Arman; James Barnhouse*; L. B. Barrentine; Sylvester Bechtel, Jr.; Maxie O. Blanton; Joe Brewer; Jack L. Brewington; Tommy R. Burgess; James C. Burkett; Utah H. Caldwell; Harold Carr; Charles Carter; Charles W. Coble; Floyd E. Cockrum; Carl T. Cooper; Douglas W. Daniel; Carroll E. Davidson; Charley W. Deaton; Oscar Derrington, Jr.; James R. Dye; Clyde G. Edwards; Gene Ellis; M. R. Garner*; G. A. Ghent; Bruce Gray, Jr.; James P. Griffin; Ray D. Halstead; Kenneth J. Hamby; James D. Hammock; Raymond Hawkins; Dale T. Healea, Jr.; Odus Howard; William D. Jefferson; Harold D. Kauffman; Cleo Keeney; James W. Kinsey; Glenn P. Kirkland; Harbert Lemay; John E. Lindquist; Robert H. Marshall; Bobby M. Mason; H.D. Matthews; James H. Mauldin; Lon McDonald, Jr.; William N. McDonald, Jr.; Charles E. Middleton; Aubrey J. Milam; R.C. Moore*; William S. Moyer; Larry W. Patterson, Sr.; Deamus Reeves; John H. Richards; Charles R. Robinson; W. D. Rogers; Edison R. Runyan; Jimmy N. Scates; Wilborn E. Shaw; Arvin E. Skidmore; Cleveland Smith; Harold T. Stapleton; James M. Staton; Robert A. Thomason; Henry E. Thompson; Harry D. Wells; Roy C. Wetherington; Ted Wheeler; Ralph E. Williams; Dorris L. Wilson; James Lovell.

Defendants: Arkansas-Best Freight Systems, Inc.; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters and Central States Conference of Teamsters, Roy L. Williams, Roy Lane and W.C. Smith, Union rep. on the Multi Conference (Central/Southern) change of operations committee and Frank E. Fitzsimmons, Union Committee Chairman and General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

*James Barnhouse, M.R. Garner, and R.C. Moore have died since the case was originally tried.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 25, 1980. A timely Petition for Re-hearing was denied on October 6, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 [1].

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§185[a]. Suits by and against labor organizations.

Suits for violation of contracts between an employer and a labor oranization representing employees in an industry affecting commence as defined in this chapter, or between any such lobor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioners, individual employees of the Arkansas-Best Freight System, Inc., ["ABF"], and members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ["IBT"], affiliated with Local 878 of the IBT, located in Little Rock, Arkansas, brought suit in the Eastern District of Arkansas against ABF, the IBT, the Southern Conference of Teamsters and the Central States Conference of Teamsters, alleging a breach by the employer of their collective bargaining agreement, the National Master Freight Agreement ["NMFA"], and alleging that the labor organizations had failed to fairly represent them in a change of operations hearing conducted in September, 1975, in Chicago, Illinois.

The suit was filed on October 30, 1975. Subject matter jurisdiction was invoked pursuant to §301 [a] of the Labor-Management Relations Act of 1947, 29 USC §185 [a].

The dispute surrounded the actions of representatives,

of the employer, and the union organizations, who sat on a"change of operations committee" [established by the NMFA] to pass upon proposals by the employer when the employer deems it necessary or desirable to change its method of operations. No change of operations may take place without approval of an appropriate change of operations committee. The committee is supposed to listen to objections from affected employees; hear the employer's arguments; and make a decision based on those arguments for and against.

The provisions of the NMFA relevant to the dispute between Petitioners and the Respondents are found in Paragraph 7 of the District Court's Findings of Fact. The NMFA prescribes the rules which a change of operations committee is to follow and those rules are found in Paragraph 13 of the District Court's Findings of Fact.

The particular change of operations which gave rise to the lawsuit in the District Court concerned a change of operations whereby ABF proposed, generally, to reduce jobs in Arkansas, Georgia, and Missouri and transfer those to terminals located in Ohio, North Carolina, Indiana, and Kansas City, Missouri. The Change of operations was known as a "multi-conference" change of operations because it involved terminals located in the Southern Conference and in the Central Conference of Teamsters. For that reason, union representatives from both the Southern Conference and the Central Conference of Teamsters were to sit on the change of operations committee, as well as an equal number of employer representatives.

ABF submitted a first and then a second proposal to two different change of operations committees [properly constituted and acting] but the proposals were rejected each time. A third plan was submitted in September, 1975, and was approved.

The Petitioners here contended in their lawsuit that the decision approving the third proposed change of operations was "tainted" and was arrived at in violation

of the NMFA because, among other things, the make-up of the committee was not in accordance with the rules and weighted against them; that the hearing conducted was a sham because approval of the plan had been obtained by ABF in advance of the hearing through impermissible ex parte contacts with committee members; that an ABF stockholder was an employer representative on the committee; that a complete, accurate record of the proceedings was not kept as was required by the rules; that union representatives on the committee failed to listen to their objections; and that the proceedings of the committee were not fairly conducted; denying them fundamental due process.

The District Court found in favor of the Petitioners on the liability aspects, detailing the procedural defects in full in its Findings of Fact, Conclusions of Law, and Memorandum.

The District Court awarded very limited equitable relieve to the sole Petitioner [James Barnhouse] who had transferred to Ohio, giving him the opportunity to return to Arkansas, and awarded monetary damages to the Petitioners, including Mr. Barnhouse, in varying amounts, based upon a formula established by it, totalling $258,868.78. [Mr. Barnhouse died within the past month, and the issue of the equitable relief awarded him is now moot.]

The judgment of liability rendered by the District Court in Petitioners' favor was affirmed in all respects by the Eighth Circuit. However, the Eighth Circuit reversed the judgment of the District Court in awarding monetary damages, and vacated all 70 awards.

The Eighth Circuit gave, essentially, two reasons for reversing and vacating the damage award. First, it said that there was "no evidence that the affected drivers were damaged any more by the action of the committee that in fact approved the third proposal than they would have been damaged had the third proposal been given fair consideration by a properly constituted committee, and if

ABF had refused to permit its employee, Little, to lobby the committee members, and if M. B. Harp had not participated in the final proceeding".

As its second reason, the Eighth Circuit stated that the trial court indulged in an assumption "that a properly organized and functioning committee could have come up with a different change of operations plan and one that, presumably, would or might have been more advantageous to the drivers," which it felt was "improper speculation" by the trial court and "clear error". [See Section VI of the Court of Appeals opinion in the Appendix.]

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS WRONG IN LIGHT OF GENERAL PRINCIPLES OF LAW AND CONFLICTS WITH DECISIONS OF OTHER APPEALS COURTS.

The appeals court affirmed, in every respect, the findings of fact of the District Court on the liability issues against all the Defendants below. In doing so, the appeals court, as did the trial court, rejected the argument of the Defendants that, because the decision of the change of operations committee was a "permissible" decision, given the "broad authority" of the chage of operations committee under the NMFA,liability could not attach to them, even though the result was achieved in an impermissible manner, in complete disregard of the contractual rights of the affected individuals.

In recognizing that the liability was properly fixed, the appeals court said:

> "But it must be kept in mind that one of the purposes of the change of operations committees is to protect ultimately the rights of individual employees, and we think that those employees have at least the right to insist that procedural safeguards that the International Union and members of the trucking industry imposed on themselves be observed. And that was not done in this case."

The appeals court recognized, and conceded, that Pe-

titioners were damaged–in its words suffered "adverse economic impacts"–by approval of the change of operations.

Yet, the appeals court vacated the 70 awards of damages on the sole basis that the Plaintiffs had produced "no evidence that the affected drivers were damaged any more by the action of the committee that in fact approved the third proposal been given fair consideration by a properly constituted committee, and if ABF had refused to permit its employee, Little, to lobby the committee members, and if M. B. Harp had not participated in the final proceedings". No authorities were cited as a basis for vacating the damage awards.

That holding has a two-fold effect:

(1) It conflicts directly with the rule of law enunciated in Bangor & A.R. Co. v. Brotherhood of Loc. Fire. and Eng., 442 F2d 812 (D.C. Cir. 1971). The Bangor & A.R. Co. case, supra, was a suit by a railroad union against railroad carriers for damages sustained by the union as a result of the carriers' wrongful "blanking" or termination, of firemen's positions in the full-crew states of Washington and Oregon. The union sought as damages lost dues, assessments, initiation fees, and other payments which would have been paid to the union if the additional firemen had been employed on the illegally "blanked" runs.

The defendants in the Bangor & A.R. Co. case argued that, even though the collective bargaining agreement had been violated in illegally blanking the firemen's positions, damages were not recoverable because the plaintiffs had not shown that the additional firemen, if hired, would have joined the BLFE rather than one of the other firemen's unions, which would satisfy the union shop clause of the agreement. In other words, the carriers argued that the plaintiffs had failed to show that they were more damaged by the breach than they would have been damaged had the breach not occurred–the identical argument made by the Defendants in the court below in this case. Different results

were reached on the same point of law, and that is where the conflict appears.

The Court of Appeals for the District of Columbia first pointed out that the uncertainty in measuring the amount of damage done to the union was created by the wrongdoing of the carriers in breaching the agreement, and that it was they, therefore, who must bear the burden of that uncertainty. the court there relied on its prior decision in Espaillat v. Berlitz Schools, etc. et al., 383 F2d 220 (D.C. Cir. 1967), and upon decisions of this Court which set out the principles of law in such cases.

The Eighth Circuit failed to distinguish either the Bangor case or the Espaillat case, and failed to explain why it felt general principles of law followed and explained by the District Court did not apply.

(2) Conceding that the Respondents were damaged by the violations found in the lower court, but vacating the damage awards because the plaintiffs had not shown that they were more damaged than they would have been had the violation of their rights not occurred, the lower court failed to apply the general principles established by this Court in Story Parchment Co. v. Patterson Parchment Paper Co., 282 US 555, 51 S.Ct. 248,75 L.Ed. 544 (1931); and Bigelow v. RKO Radio Pictures, 327 US 251, 66 S.CT. 574, 90 L. ED. 652 (1946). That is, where the wrongdoing is "of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . . the wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise". Story Parchment Co. v. Patterson Parchment Paper Co., 282 US 555, 563, 51 S.Ct. 248, 250.

By failing to recognize that it was the result of the change

of operations committee wrongfully and impermissibly achieved which made the amount of damages to the Petitioners difficult of ascertainment, the Court below has effectively relieved the wrongdoers from making any amends for their wrongful and illegal acts. The Plaintiffs are left with no remedy.

That conflict with general principles of justice alone, justifies the grant of certiorari to review the judgment below.

2. THE DECISION OF THE LOWER COURT CASTS SIGNIFICANT DOUBT ON THE ABILITY OF INDIVIDUAL EMPLOYEE/LITIGANTS TO OBTAIN RELIEF UNDER 29 USC §185 (a) IN THE FUTURE.

The practical effect of the lower court's reversal and dismissal of the damage claims is to make it virtually impossible for individual employees in situations similar to Plaintiffs' below to obtain redress in money damages for wrongs visited upon them in violation of their collective bargaining agreement and when their union fails to fairly represent them in change of operations decisions. This is so for at least two reasons.

First, the ruling below removes the burden of proving a defense from the labor union/employer defendants and improperly places that burden on the plaintiffs. In doing so, the ruling directly conflicts with the rulings in Bangor & A.R. Co. v. Brotherhood of Loc. Fire. and Eng., 442 F2d 812 (1971), and Espaillat v. Berlitz Schools, etc., et al., 383 F2d 220 (D.C. Cir. 1967).

The Plaintiffs, at trial, proved that the change of operations had been wrongfully and impermissibly approved, and that they had been damaged by the change of operations. Because of the nature of the change of operations, the exact amounts of their damages were not precisely determinable.

In that situation, as was pointed out in Bangor & A.R. Co.,

supra, at 882, fn 8, the burden is on the wrongdoer of proving the defense that the damages suffered were not attributable to the wrongdoing. In the decision in this case below, the Court of Appeals made a converse ruling.

That is, the Court said that the Plaintiffs had failed to prove that, although they were damaged, they were more damaged than they otherwise would have been had they been treated fairly, which, again, directly conflicts with the rulings of the Court of Appeals for the District of Columbia in both the Bangor & A.R. Co., and Espaillat v. Berlitz Schools, etc., et al., cases, supra.

In the Espaillat case, the Court of Appeals for the District of Columbia held that the plaintiffs right to recover damages should not fail because of the absence of a "comparison" between the plaintiffs' earnings in a similar engagement prior to her employer by that defendant and what her earnings would have been throughout the remaining period of her contract, which was wrongfully terminated. Indeed, that "comparison" requirement was impossible for the plaintiff to fulfill.

Here, the Eighth Circuit rejected that reasoning set forth in Espaillat v. Berlitz Schools, etc., et al., supra, by saying that because the Plaintiffs could not compare damages suffered as a result of a wrongfully approved change of operations with damages they might have suffered in a rightfully approved change of operations, their entire claim for damages must fail and that, in fact, they have no claim for damages.

The practical effect of that ruling is that no individual will ever have a claim for damages when a change of operations is approved in violation of his contracts and without according him fundamental fairness. He will not have a comparison to make.

This lawsuit is very different from the common "Section 301 Taft-Hartley" lawsuit in that the violations occurred on

a much higher level and involved many employees and their families who, because of a change of operations, had to move from state to state, work irregular hours, and disrupt their entire lifestyles.

Only one change of operations was approved. To attempt a comparison between the results of a change of operations that occurred and an unknown, non-occurring change is impossible. There are simply too many variables. The only protection for employees affected by a change of operations is a fairly conducted hearing in accordance with the NMFA. If they are not accorded that protection, and a change is improperly approved, the decision of the Eighth Circuit leaves them without a remedy.

The decision of the court below places on Plaintiffs and others in their situation, the burden of doing the impossible, and renders 29 USC §185 (a) rights meaningless in such situations as the Plaintiffs below encountered.

Finally, the Eighth Circuit found "clear error" in an assumption it felt the District Court had made. In truth, the District Court had expressly refused to engage in that assumption in its memorandum opinion. No assumption or presumption formed a basis for the District Court's judgment. The District Court grounded its judgment on its belief that the employees affected by the decision of the change of operations committee were entitled to have a decision made in accordance with their contract and in good faith and honesty. The Eighth Circuit misapprehended or misunderstood the nature of the rights which had been violated. Under those circumstances, vacation of the damage awards simply cannot be justified.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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and
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December 2, 1980

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

GLENN P. KIRKLAND, LLOYD BARRENTINE, R.C. MOORE, W.D. ROGERS, CHARLES W. COBLE, ROBERT JONES AND C.L. ALLEN,

Plaintiffs,

v.

ARKANSAS – BEST FREIGHT SYSTEM, INC.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN CONFERENCE OF TEAMSTERS and CENTRAL STATES CONFERENCE OF TEAMSTERS, both affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; ROY L. WILLIAMS, ROY LANE and W. C. Smith, Union Representatives on the MULTI-CONFERENCE (CENTRAL STATES/SOUTHERN) CHANGE OF OPERATIONS COMMITTEE; and FRANK E. FITZSIMMONS, Union Committee Chairman and General President, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

Civil No. LR-75-C-330

FINDINGS OF FACT AND CONCLUSIONS OF LAW

MEMORANDUM

FILED
JULY 20, 1978

FINDINGS OF FACT

1. The plaintiffs are employees of the Arkansas-Best Freight System, Inc., and members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and an affiliated local union.

2. Arkansas-Best transports freight throughout the United States of America. It maintains terminal facilities in Little Rock, St. Louis, Kansas City, Dayton, Indianapolis, Cape Girardeau, Cincinnati, Atlanta, Asheville and numerous other cities. Prior to the commencement of this action, it maintained a terminal in Fort Smith. It is engaged in the hauling of motor freight in approximately twenty-five states. It is an "employer" as that term is defined in the National Labor Relations Act and is engaged in interstate commerce. Jurisdiction of the Court in this matter is founded on §301 of the National Labor Relations Act, 29 U.S.C. §185.

3. The defendants, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Southern Conference of Teamsters and Central States Conference of Teamsters are labor organizations as that term is defined in the National Labor Relations Act.

4. Roy C. Lane is an officer of Teamsters Local 200, a part-time organizer for the Central States Conference of Teamsters, and Chairman of the Central States Change of Operations Committee. W. C. Smith is a General Organizer of the International Union, and Chairman of the Change of Operations Committee for the Southern Conference of Teamsters.

5. Prior to July 1, 1973, a National Master Freight Agreement covering over-the-road and local cartage employees was negotiated for the period July 1, 1973, through March 31, 1976. The parties to the agreement were employer associations authorized to negotiate on behalf of individual employers, individual employers who signed the agreement, the Teamsters National Freight Industry Negotiating Com-

mittee of the International Brotherhood of Teamsters, and the local unions that signed the agreement. The Chairman of the Teamsters Committee is Frank E. Fitzsimmons, the General President of the International Union.

6. Prior to July 1, 1973, supplemental agreements covering the Central States and Southern Conference Areas were negotiated for the period July1, 1973, through March 31, 1976. The Central States Agreement covered drivers employed in Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, Kentucky, West Virginia and Colorado. This agreement was between associations of employers or individual employers operating in that area, the Central States Drivers Council and individual local unions.

The Southern Conference Agreement covered drivers employed in Alabama, Florida, Georgia, Mississippi, Tennessee, Arkansas, Louisiana, Oklahoma and Texas. This agreement was between associations of employers or individual employers operating in that area, the Southern Conference of Teamsters and individual local unions.

7. The National Master Freight Agreement contains the following provisions:

> Seniority rights for employees shall prevail under this Agreement and all Agreements supplemental hereto. Seniority shall only be broken by discharge, voluntary quit, more than a three (3) year layoff, or for such greater period than three (3) years as a change of operations committee may direct during the third year as provided in Article 8, Section 6 herein, or as provided in any applicable provisions of the Supplemental Agreements. The extent to which Seniority shall be applied and accrued as well as the methods and procedures of such application shall be clearly set forth in each of the Supplemental Agreements.

Article 5, Section 1.

(b) Closing of branches, terminals, divisions or operations.

* * * *

(2) When a branch, terminal, division or operation is closed or partially closed and the work of the branch, terminal, division or operation is transferred to another branch, terminal, division or operation in whole or in part, employees at the closed or partially closed down branch, terminal, division or operation shall have the right to transfer to the branch, terminal, division or operation into which the work was transferred prior to the recall of laid off employees at that location. Such employees transferring as a result of an approved change of operations, shall be dovetailed with their full classification seniority (city or road) into the active seniority roster at the point of redomicile, excluding those employees on letter of layoff. If and when additional employees are required at the point of redomicile, employees on layoff status at that location shall be recalled. When recalled, such laid off employees shall be dovetailed with their full seniority.

Article 5, Section 5 (b) (2).

Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate change of operations committee. Such committee shall be appointed in each of the Conference Areas, equally composed of employer and union representatives. The change of operations committee shall have the authority to determine the seniority of the employees affected and such determination shall be final and binding.

The change of operations committee shall also have jurisdiction for a period of twelve (12) months

following the opening of a new terminal to consider the redomicile of employees who are laid off as a direct result of such opening of terminal.

This committee shall also have jurisdiction over the closing of terminals in regard to seniority. This shall not apply within a 25-mile radius. In considering any change of operations, this committee shall have the power to extend the three (3) year layoff period contained in Article 5, Section 1, or in applicable Supplemental Agreements, in the event it appears toward the end of such period that the circumstances warrant.

The Committee shall observe the employer's right to designate home domiciles and the operational requirements of the business. However, individual employees shall not be redomiciled more than once during the term of the contract as a result of an approved change of operations unless a merger, purchase, sale, acquisition, or consolidation of employers is involved, or unless the change of operations committee rules to the contrary based on the facts presented.

The National Grievance Committee shall adopt Rules of Procedure concerning the application and administration of this Article.

The Employer shall notify all affected Local Unions of the proposed Change of Operations at least twenty (20) Calendar days prior to the hearing at the Joint Area Conference Committee and the Employer and the Local Unions affected shall have a mutual responsibility to inform the affected employees prior to such hearing in accordance with the practice and procedures agreed to in the respective area committees. Any exception or waiver of the aforesaid twenty (20) day period shall be mutually agreed to between the Employer and the Local Unions affected and approved by the Conference Area Change of Operations Committee.

Where an employee is required, through no fault of his own, to change domicile in order to follow employment as a result of an approved Change of Operations the Employer shall move the employee and assume the responsibility for proven loss of or damage to household goods due to such move including insurance against loss or damage. Should any employee possess household items of unusual or extraordinary value which will be included in the move such items shall be declared and an appraised value determined prior to the move. The Employer shall provide packing materials for the employee's household goods when requested or at the employee's request pay all costs and expenses of moving such household goods, including packing. This shall not apply to moves within 50 miles radius.

The Employer shall pay reasonable expenses to demount and remount an employee's mobile home, if used as his residence and in such instance shall pay normal expenses to move such mobile home, including the use of other modes of transportation where required by law.

The Employer shall provide lodging for the employee at the point of redomicile, not to exceed thirty (30) calendar days, and in addition, shall reimburse the employee 10 (cents) per mile to transport one personal automobile to the new location.

The Employer shall not be responsible for moving expenses if the employee changes his residence as a result of voluntary transfer.

Article 8, Section 6.

8. The supplemental agreements covering the Southern Conference and Central States Areas also have provisions relating to seniority.

Central States Conference of Teamsters generally uses a "terminal" seniority system. "Terminal seniority" is a term which describes a seniority application in which the driver maintains a position on the seniority list only at the terminal in which he is employed. If he is laid off at the terminal for lack of work, he may not exercise any seniority into any other terminal of the employer.

The Southern Conference of Teamsters additionally uses "system" seniority. "System" seniority is a term which is applied to a seniority application in which the driver enjoys a seniority position based on his length of service with the employer. When vacancies occur in other terminals or when jobs are open for bid in any one of the employer's terminals, any employee working within that entire system may exercise his seniority to bid the available job.

"Modified system" seniority is a term which describes a seniority application similar to "system" seniority but which permits the driver to exercise this system seniority only when he cannot hold employment in the terminal at which he is working. If he faces layoff in his terminal, he may bid to any other terminal of the employer covered by this seniority agreement where a junior man is working. This modified system seniority is lost when the driver moves out of the Southern Area.

The "System" and "modified system" are put into effect in the Southern Conference only after a vote of the employees affected.

9. In May, 1975, Arkansas-Best proposed a change of operations. The proposed change was scheduled to be heard at the June, 1975, hearings in Chicago. This proposal involved changes in the domicile of drivers in ten terminals located in the Southern and Central States Conference Areas. Each terminal was described in the proposal, with existing runs and proposed new runs outlined in detail. Seniority lists were presented and detailed procedures outlined for the drivers to select terminal preferences by seniority.

Under this proposal, the impact on drivers at the various involved terminals whould have been as follows:

Losing Terminals	Impact
St. Louis	Minus 9
Cape Girardeau	Minus 18
Little Rock	Minus 18
Atlanta	Minus 9
Fort Smith	Minus 14
Gaining Terminals	
Kansas City	Plus 1
Dayton	Plus 40
Asheville	Plus 3
Cincinnati	Plus 9
Indianapolis	Plus 8

10. The meeting on the proposed change of operations was held in June, 1975. The following persons served on the Committee hearing the change of operations:

Employer Representatives	Union Representatives
Hal Franke Central Conference	Roy Lane Central Conference
M. B. Harp Southern Conference	W. C. Smith Southern Conference

Others may also have served on the Committee, but no witness was able to say who they may have been. Roy Lane served as chairman.

11. Arkansas-Best presented its proposed change of operations plan to the committee. The Little Rock, Fort Smith, Cape Girardeau and St. Louis local unions objected vigorously to the proposed change because they would lose significant numbers of employees. The plan was also objected to by Lane. He was the dominating member of the Change

of Operations Committee. Roy Lane, W.C. Smith and others suggested changes in the plan. Arkansas-Best was further asked to withdraw the request and submit a new request to the Change of Operations Committee in the Southern Conference.

12. M. B. Harp owned 1,213 shares of ABC stock, a holding company which has among its subsidiaries Arkansas Best Freight System, Inc.

13. On September 26, 1973, the National Grievance Committee, established by the National Master Freight Agreement, adopted Rules of Procedure. Article III of these rules cover changes of operation. The rules provide:

ARTICLE III – CHANGE OF OPERATIONS

(A) Proposals for changes of operation filed under Article 8(c) of the National Master Freight Agreement involving members of Local Unions which are located in more than one Conference Area, shall be filed with both the Union and Employer Secretaries of the National Grievance Committee. The filing shall include a list of the Local Unions involved, together with their addresses. In addition, the Employer shall mail the proposed change of operation directly to the Local Unions listed.

(B) The Employer and Union Secretaries of the National Grievance Committee shall jointly assign the proposed change of operation to one of the Conference Joint Area Change of Operations Committees. Time of filing requirements of the Area Rules of Procedure shall not apply, but in any event, reasonable notice shall be given to all parties. How-

ever, if meeting conflicts occur, the Secretaries may, at their discretion, reassign or reschedule the Change.

(C) The rules of procedure of the Conference Joint Area Change of Operations Committees shall be followed by all parties, but equal Employer and Union representation from the other affected Conference Areas, shall be allowed on such Change of Operations Committees. The Employer and the Union Change of Operations Committee Chairmen shall have the right to designate the respective committee members consistent with the above.

(D) A record shall be made of the proceedings before the Conference Change of Operations Committee and, in the event of deadlock, such transcript and records shall be forwarded directly to the Employer and Union Secretaries of the National Grievance Committee, the latter then having jurisdiction of the matter. The transcript and records so forwarded shall be the sole basis for committee decisions unless other methods of obtaining evidence are agreed to by the National Grievance Committee.

(E) Changes of operation which involve members of Local Unions which are located solely in one Conference, shall be processed pursuant to the rules of procedure of the applicable Change of Operations Committee. In the event of deadlock thereof the matter is to be processed pursuant to the National Grievance Procedure of Article 8 of the National Master Freight Agreement.

W. C. Smith and Roy Lane testified that Rule III (C) was modified by custom and practice to permit unequal representation on inter-conference Change of Operations Committees. I do not credit this testimony. No such custom and

practice was shown.

14. Rule III (C) of the Rules of Procedure was followed at the June, 1975, hearing as there was equal representation from each Conference on the Committee.

15. On July 17, 1975, a second proposed change of operations was submitted to a Change of Operations Committee consisting of:

Employer Representatives	Union Representatives
R. Pulliam Southern Conference	W. C. Smith Southern Conference
R. Braziel Central States Conference	K. Rittman Central States Conference
K. Skaggs Eastern Conference	W. Neidig Eastern Conference

This Committee was constituted in accordance with the Rules of Procedure of the Change of Operations Committee. A new concept was advanced at this hearing that would have permitted the individuals at the affected terminals to make a "paper bid." This was done in the hope of reducing the actual number of moves since the "domino" effect of moving could be avoided. The Little Rock, Cape Girardeau, Kansas City, St. Louis and Fort Smith locals objected to the change. The Asheville and Cincinnati locals had no objections. No decisions were made. Arkansas-Best was given the right to withdraw the change. It subsequently exercised this right.

16. Arkansas-Best proposed a third change which was heard in September, 1975. This proposal followed the first proposal in some respects, but had a significantly greater adverse impact on locals affiliated with the Southern Conference. Under that proposal, the locals were affected as follows:

Losing Terminals	Impact
St. Louis	Minus 5
Cape Girardeau	Minus 6
Little Rock	Minus 25
Fort Smith	Minus 14
Gaining Terminals	
Kansas City	Plus 2
Dayton	Plus 38
Cincinnati	Plus 5
Indianapolis	Plus 5

The proposal did not permit the drivers from Little Rock or Fort Smith to follow their work to St. Louis and Cape Girardeau.

The members of the Change of Operations Committee were as follows:

Employer Representatives	Union Representatives
Hal Franke Central States Conference	Roy Lane Central States Conference
M. B. Harp Southern Conference	W.C. Smith Southern Conference
Wayne Henderson Central States Conference	R. Fularczyk Central States Conference

The Change of Operations was not constituted in accordance with the Rules of Procedure insofar as the Central States Conference had two representatives on the Committee and the Southern Conference had one. M. B. Harp, who continued to hold ABC stock, was again a member of the Committee.

17. The Cape Girardeau, St. Louis, Dayton, Little Rock and Fort Smith locals objected to the change. The Indianapolis, Kansas City and Cincinnati locals did not object to the change.

18. Don Little, a labor relations assistant for Arkansas-Best, contacted both Roy Lane and W.C. Smith prior to the September hearing to discuss the proposed change of operations. Smith indicated that he would vote for approval of the change. I specifically credit the testimony of Little in this regard.

Little also contacted Hal Franke prior to the September hearing. Franke assisted Little in the preparation of the change of operations presentation.

19. An accurate record was not made at the third hearing. The transcript of the third hearing shows that Smith talked to Alfred Pickering, the president of the Little Rock local, whereas such a conversation never occurred. The transcript also fails to record an exchange of words between Lane and Pickering. I specifically credit the testimony of Glenn Kirkland in this regard.

20. W. C. Smith played a passive role in the third hearing He did not speak once during the local union's presentation. Instead, he read a newspaper and smoked a cigar during the entire hearing. I credit the testimony of Glenn Kirkland in this regard.

21. Roy Lane was the dominant force on the first and third Change of Operations Committees. This dominance was manifested in various ways. First, he repeatedly made decisions for the Committee without seeking the concurrence of other Committee members. Second, he frequeently interpreted the collective bargaining agreement without asking the views of other members of the Committee.

22. Lane was more protective of the rights of the members of the Central States Conference than he was of the Southern Conference.

23. In 1975, the longtime leadership of Local 878 of the I.B.T., Little Rock, was defeated by a slate led by employees

of Arkansas-Best, including many of the plaintiffs in this action. Supporters of the defeated officers encouraged the president of the International Union to appoint a trustee for the local union. The local union attempted to secure a restraining order seeking delay of a trusteeship hearing. This request was granted in part, and the International Union sent an investigating committee into the local. A decision was subsequently made by the president of the International Union not to put the local into trusteeship. A factor in that decision was the willingness of the plaintiffs in this action to resist the International Union's actions in court. Relations between the officers and agents of the International Union and the Southern Conference and the plaintiffs continued to be strained during the period of time that the change of operations proposals were being heard. This strained relationship was a factor in the decision of Lane, Smith and Fularczyk to accept the plan proposed by Arkansas-Best at the third change of operations hearing.

24. There is no evidence in the record to support the plaintiffs' allegation that the International Union encouraged Arkansas-Best to make the request for a change of operations, nor is there any evidence in the record to support plaintiffs' allegation that the members of the Change of Operations Committee were bribed by Arkansas-Best to support the change of operations.

25. When the change of operations was put into effect, the Little Rock terminal had in excess of 150 driver. Eighteen of them were on layoff status.

26. Twenty-five drivers were needed to fill the vacancies in the Central States Conference terminals, most of the vacancies were in Dayton. Twenty-five drivers were given the opportunity by seniority to bid into the master active pool and then into a Central States terminal.

27. Under the modified seniority provisions in effect in the Southern Conference, Fort Smith drivers were given the alternative of taking a letter of layoff and waiting for

the work to resume at Fort Smith, bidding into the master active pool and obtaining work in the Central States Conference of Teamsters, or exercising their modified seniority system and bumping into any terminal in the south where a junior man was working. Twelve Fort Smith drivers chose to bump into Little Rock. This had the effect of requiring an equal number of Little Rock drivers to move to the Central States Conference or to take layoff status. Twenty-one Little Rock drivers elected to move to the Central States Conference; four were placed on layoff.

28. The plaintiffs contend that the change of operations approved by the Committee was violative of Article 5, Section 5(B) (2) of the National Master Freight Agreement and the Modified Southern Conference Seniority provisions as interpreted and applied. This contention is not without merit, but the Court finds that the interpretations given to these clauses of the agreements by the Change of Operations Committee were not impermissible ones given the broad authority of the Change of Operations Committee.

29. The Change of Operations Committee has the duty to resolve questions of seniority and domicile fairly and in good faith, and in accordance with established rules of procedure and fundamental due process. Moreover, the union members of the Committee have a duty to fairly represent all employees involved in the change.

30. Established rules of procedure were not followed with respect to the change of operations.

a. The Change of Operations Committee, which granted the change, was not constituted in accordance with the written Rules of Procedure.

b. An employer member of the Committee had a significant interest in Arkansas-Best and, thus, was not qualified to sit as a member of the Committee.

c. A complete record of the hearing was not kept.

31. Fundamental rules of fairness were violated.

a. Employees of Arkansas-Best had ex parte pre-hearing contacts with members of the Change of Operations Committee.

b. W.C. Smith, a union member of the Change of Operations Committee, consented to the change before hearing the views of the Fort Smith and Little Rock local unions. While it could be said that he was somewhat informed of their views because of his participation in the prior hearings and because of his status as an international organizer for the Southern Conference, his conduct in giving his assent before the hearing as to the proposed change and in assuming a passive role at the change of operations hearing, was improper.

c. Roy Lane, the chairman of the Change of Operations Committee, conducted himself improperly by deciding issues without giving other members of the Committee a chance to participate in the decision-making process.

32. The union representatives on the Change of Operations Committee, particularly Lane and Smith, failed to fairly represent the plaintiffs at the change of operations hearing. They acted in bad faith.

a. Lane and Smith permitted the fact that plaintiffs had exercised their right to change the leadership of their own local union and to resist the imposition of a trusteeship by the International Union to affect their decisions in the matter.

b. Smith, the representative of the Southern Conference of Teamsters, failed to adequately represent the employees of that Conference at the third change of operations hearing for the reasons stated in Finding No. 31b.

33. Each of the violations set forth in Findings Nos. 30, 31 and 32 is sufficient grounds for holding that the decision

of the Change of Operations Committee was arrived at in violation of the collective bargaining agreement and in violation of law. The International Union and the defendant conferences are each responsible for the actions of its members of the Change of Operations Committee.

34. *Damages.*

The plaintiffs are entitled to damages. The plaintiffs have neither alleged nor proved future damages. We award none. We do determine the principles that shall be followed in computing damages and compute the damages for the twelve representative plaintiffs on whose behalf testimony was ordered. We direct the parties hereto to meet for the purpose of fixing damages for the remaining plaintiffs and to agree on their damage awards within fifteen days of the date that this order is entered. If the parties are unable to agree as to the damages to be awarded to any or all of the remaining plaintiffs, the Court will appoint a master to hear additional testimony with respect to such damages and to make recommendations. The Court will assess the costs of such a master after the master has made his recommendations to the Court. Damages shall be computed with respect thereto as follows:

a. Persons who transferred from Little Rock or Fort Smith to another terminal in the Central States or Southern Conference of Teamsters shall be entitled to receive the expenses reasonably incurred in making the transfer, less any expenses heretofore reimbursed by the employer. In computing these expenses, no deductions will be made for any increase in earnings by an employee who transferred.

b. Employees who were members of the Fort Smith local were not required to move from Fort Smith to mitigate their damages. Employees who were members of the Little Rock local were not required to move from Little Rock to mitigate their damages. They were required to seek comparable work in the communities in which they live. Employees who

remained at Little Rock or Fort Smith and who were laid off or had reduced work as a result of the change of operations decision are entitled to receive compensation on the basis of the following formula: The miles driven by an employee in the twelve months preceding the change will be computed. The miles driven by an employee in each of the next two twelve-month periods will be computed. The miles driven by the employees in each of the two twelve-month periods subsequent to the change will be deducted from the miles driven in the twelve-month period preceding the change, and an allowance of eighteen cents per mile will be made. Pursuant to an agreement between the parties, credit for unemployment compensation benefits in the amount of $100.00 per week will be given. No credit will be given for earnings from a farm or business if the business was one which was formed prior to the change of operations or one that was formed thereafter and has continued from the change of operations to this date, unless it is clearly demonstrated that the earnings from the farm or business substantially increased during the period of layoff or reduced earnings.

c. Employees will be compensated for lost vacation or holiday pay but will not be compensated for loss of sick pay.

d. Employees who had fixed runs involving fixed hours prior to the change, but were relegated to other runs after the change, and were required to be on duty on a 24-hour a day, seven days a week, basis are entitled to be reimbursed for having to stand by the extra hours. The Court fixes these damages at $2,500 per year.

e. The plaintiffs listed below are awarded the sum listed beside their names. The Court finds that their damages flowed directly from the improper and unlawful decision of the Change of Operations Committee, and that the defendants are jointly and severly liable for their payment:

James E. Barnhouse	$ 7,000
W. D. Rogers	$ 5,000

Carl T. Cooper	$ 5,000
Glenn P. Kirkland	$ 8,000
Lloyd B. Barrentine	$ 2,400
Clarence Allen	-0-
Wayne Coble	$ 3,000
Reuben C. Moore	$ 1,500
Arvin E. Skidmore	$ 4,200
Keith M. Alsip	$ 1,400
Norman McDonald	$ 3,000
Jimmy N. Scates	$ 1,500

35. *Equitable Relief.*

The plaintiffs request that the change of operations decision be set aside and the status quo be restored.

The defendants would permit the status quo to remain and would establish a new Change of Operations Committee. They would permit the Committee to decide if the initial change should be ratified, amended or set aside.

Neither approach is equitable. The first is inequitable because it ignores the fact that many employees who are not parties to this action would be substantially affected, the cost to the employer – who is only partially responsible – would be prohibitive, and interstate commerce would be adversely affected. This approach is inequitable for another reason. Months have passed since the change was approved. The defendants have not been responsible for all of the delay; some was caused by the congestion of the calendar. The second is inequitable because it would leave to the parties, who have violated their trust and the collective bargaining agreement, the power to determine the extent of the equitable relief.

In light of the above, it is the order of the Court that plaintiffs who had accepted a transfer to a terminal other than Little Rock shall be given an opportunity to transfer to Little Rock whenever a vacancy occurs on the Little Rock

board. The parties shall agree to reasonable procedures for notifying the plaintiffs of these vacancies and their manner of acceptance, and shall submit these procedures to this Court within thrity days of the date that final judgment is entered herein.

Plaintiffs shall be given the opportunity to return to Little Rock in order of their seniority, but no plaintiff shall have more than one opportunity. On returning to Little Rock, the plaintiffs shall be given a position on the Little Rock seniority board commensurate with their total seniority with Arkansas-Best. Expenses incurred in such retransfer shall be borne by the defendants in accordance with the principles heretofore established. Upon retransfer to Little Rock, employees will have their Southern Conference modified seniority restored to them.

CONCLUSIONS OF LAW

1. The Court has jurisdiction pursuant to 28 U.S.C. §1336 and 29 U.S.C. §185.

2. The decision of the Change of Operations Committee is set aside because:

It was reached in violation of the Rules of Procedure established by the collective bargaining agreement;

Fundamental rules of fairness were violated in the decision-making process; and

The union representatives on the Committee acted in bad faith and failed to fairly represent the plaintiffs at the change of operations hearing.

3. The plaintiffs who submitted testimony with respect to damages are awarded damages in the sums set forth in Findings No. 34c. The remaining plaintiffs will be given an opportunity to prove damages in accordance with Finding

4. The individual defendants are dismissed pursuant to stipulation by the parties. The remaining defendants are jointly and severly liable for the payment of all damages.

5. The plaintiffs are entitled to equitable relief in accordance with Findings No. 35.

6. When damages have been ascertained with respect to the remaining plaintiffs, the Court will cause a judgment consistent with these Findings of Fact and Conclusions of Law to be entered. Until such time it is not intended by this Court that this order shall be a final and appealable one.

MEMORANDUM

The Findings of Fact and Conclusions of law set forth the Court's reasons for deciding this case. The court deems it important, however, to acknowledge arguments made by the defendants in briefs and in oral argument. The Court recognizes the necessity for a Change of Operations Committee, and is aware that it does not have the power to set aside a Committee's decision unless the Committee failed to follow the rules established for it in some material way or failed to accord the parties fundamental due process, or the union representatives failed to fairly represent the employees involved or acted in bad faith. Each of the stated reasons for setting aside a decision is present here.

The Court notes and rejects the defendants' argument that a decision cannot be set aside if it is a permissible one under the contract. The argument proves too much. If followed to its logical conclusion, it would permit a Change of Operations Committee to openly and flagrantly violate its own rules and regulations, and to discriminate against individual employees as long as it could be said that the result reached was a permissible one. This Court is unwilling

to asume that a properly composed Change of Operations Committee, acting in accordance with the Rules of Procedure and fundamental due process, would necessarily have arrived at the same decision as this Change of Operations Committee did. Admittedly, the Change of Operations Committee has broad authority. Admittedly, the decision arrived at was a permissible one, but there were other permissible results which could have been reached under the seniority provisions of the various collective bargaining agreements. Some of them would have been more beneficial to the plaintiffs than the one reached. This does not mean that the plaintiffs were entitled to a decision which would be to their benefit and to the detriment of other employees. It only means that all affected employees were entitled to have a decision made in accordance with the established written Rules of Procedure and to have that decision reached in complete honesty and good faith and in accordance with fundamental due process. Indeed, unless the employees of the industry perceive that change of operations decisions are made on this basis, the wide authority now given to committees may be severly limited and the whole industry may be the loser.

The defendants raise another argument. They argue that because the plaintiffs failed to object to the composition of the Change of Operations Committee, they are now foreclosed from making such an objection before this Court. The Court is unwilling to accept that argument for several reasons. First, it should be noted that the first and second Change of Operations Committees were properly composed. Second, it is clear from the record that the employees had no way of knowing who would constitute the Committee until they arrived at the meeting. Third, in light of the record as a whole, the Court finds that it would have been useless for the employees to make any objections to the composition of the Committee at the time of the hearing.

The unions argue that it was proper for their leaders to be partisan. The Court accepts this agrument, with one important exception. Partisanship must be exercised fairly on behalf of all affected employees, not only a segment of

them. The Court even accepts the fact that representatives of both the Central States Conference and the Southern Conference will protect the interests of their respective members to the best of their ability. The Court cannot, however, accept a stacking of the committees so that the representatives of one Conference are in a position to out-vote the representatives of another. In this regard, the Court is aware of the testimony of one or more union witnesses that representatives of the Change of Operations Committee are not solicitous for their Conference members when they sit on the committees. The Court's answer to this contention is that it is belied by the record. This is not to say that men of intelligence, integrity and judgment will not be fair to members of every Conference. The Court merely acknowledges that the Rules of Procedure recognize the difficult position in which union representatives are placed in such matters and attempt to guard against difficulties by providing for equal representation from each Conference when changes in operations involve more than a single Conference.

The defendants argue that ex parte conversations between employer representatives and union officials are proper. This Court cannot agree that it is proper for an employer seeking a change of operations to contact one of the members of a Change of Operations Committee on an ex parte basis. It is, of course, proper for an employer to contact the local unions involved and to explain the change of operations to them prior to the hearing so that they will have an opportunity to review it, understand it and to take a position on it. However, it is not proper to seek out and attempt to persuade the members of the panel.

The employer finally asserts that no damages can be awarded because they are too speculative. The Court recognizes the difficulties involved in assessing damages, but feels that the principles used by it are fair and reasonable, particularly in light of the limited equitable relief that is possible. It is not easy to measure the damages incurred by an employee who is required to sell his home and move or to be on call twenty-four hours a day, seven days a week;

but the damages are reasonably measured by the techniques used by the Court and no more is necessary. Nor is it an answer to say that, because the change was a permissible one, no damages can be given even though the one approved was approved in an unlawful manner. If one were to follow this line of reasoning, employees would have no way of requiring their union to represent them fairly or of requiring change of operations committees to follow agreed-upon procedures.

This memorandum is incorporated in the Findings of Fact and Conclusions of Law.

Dated: July 18, 1978

Civil No. LR-75-C-330

SUPPLEMENTAL
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
MEMORANDUM

FILED
JUNE 25, 1979

SUPPLEMENTAL FINDINGS OF FACT

1. On July 20, 1975, the Court filed its Findings of Fact and Conclusions of Law in the above entitled matter. These findings and conclusions are hereby affirmed.

2. Pursuant to Findings No. 34, the parties have agreed on damages for a number of plaintiffs, but were unable to agree as to others. On November 27, 1978, an Order of Reference was filed appointing Robert F. Fussell as a master to hear additional testimony with respect to such persons and to make his recommendations.

3. The master found that the following plaintiffs were entitled to damages in the amounts set forth beside their names:

Bechtel	$ 1,105.77
Blanton	5,175.18
Brewington	8,708.56
Burgess	3,454.90
Caldwell	2,932.70
Carr	3,130.00
Cockrum	869.94
Derrington	4,584.90
Dye	3,192.66
Ellis	3,808.44
Gray	1,766.88
Griffin	5,497.40
Healea	1,786.85
Howard	1,703.70
Jefferson	7,404.66
Kauffman	7,761.14
Lemay	12,719.56
Lindquist	1,632.00
McDonald	3,065.58
Marshall	5,627.70
Mason	2,700.54
Mauldin	9,547.93
Middleton	2,932.70
Milam	2,019.23
Moyer	2,840.30
Patterson	3,999.56
Richards	2,720.48
Runyan	3,400.24
Shaw	89.00

Cleveland Smith	3,295.98
Stanton	1,841.14
Stapleton	205.02
Thomason	4,142.50
H. Thompson	841.50
Wells	612.36

The Court has carefully reviewed the record and adopts the master's report. *See* fed. R. Civ. P. 53(e)(2).

4. The plaintiffs' objections to the master's damage findings with respect to plaintiffs Derrington, Middleton and Caldwell are rejected.

5. On December 22, 1978, the claims of Charles R. Robinson and James W. Kinsey came before the Court for a hearing to determine the amount of their loss resulting from the change of operations. After having heard the evidence and the arguments of counsel, the Court finds that Robinson is entitled to damages in the amount of $1,764.15, and that Kinsey is entitled to damages in the amount of $4,284.66.

6. Subject to the objections that have already been registered to the Court's Findings of Fact and Conclusions of Law, the parties have agreed that the following individuals are entitled, pursuant to the Court's findings, to damages in the following amounts:

Arman	$ 931.86
Carter	1,000.98
Daniel	4.063.50
Davidson	4.098.78
Halstead	1,878.12
Hammock	2,225.70
Keeney	5,094.18
Matthews	409.68
Reaves	6,274.80
Wetherington	1,028.61
Williams	3,100.68
Wilson	7,135.74

Garner	469.00
Deaton	2,459.52
Brewer	378.76
Edwards	5,942.88
Ghent	4,688.44
Wheeler	6,002.10
Burkett	5,000.00
Hamby	5,000.00
Hawkins	8,131.32
Lovell	8,388.32

7. No other plaintiffs are entitled to money damages.

8. In August, 1978, the Court was contacted by several drivers who had been transferred to Dayton, Ohio. They had originally been plaintiffs in this action, but subsequently opted out. They alleged that they had been misled by certain correspondence from plaintiffs' counsel and that they would have remained as plaintiffs but for this misunderstanding. The Court notified counsel of this correspondence and required any individual with the same allegations to contact plaintiffs' counsel by August 28, 1978. A hearing was held on August 28,1978, to determine the matter. The Court found, that except for one individual whose name had inadvertently been left off the list of plaintiffs, that all of these individuals had refrained from further participation in the action with knowledge of its essential nature.

9. On September 7, 1977, Glen Farrier moved to permit the submission of various documents concerning his claim which the Court granted. The plaintiffs now move that Farrier be made a plaintiff. Farrier appears to be in the same situation as those individuals who were denied reentry into the action at the August hearing. Although he was aware of the Court's ruling that his claim should be submitted prior to August 28, 1978, he states no reason for failing to do so.

10. The Court also finds that a reasonable fee for the

master's time and expenses is $4,462.82 in accordance with his Statement for Services Rendered. The costs of the court reporter are $612.00. The master's fee and the associated costs of the master's proceedings will be taxed 50% to the plaintiffs and 50% to the defendants.

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The master's report is adopted.

2. The plaintiffs set forth in Supplemental Findings Nos. 3, 5 and 6 are awarded damages in the sums set forth beside their names.

3. No other plaintiffs are entitled to money damages, but are entitled to the equitable relief specified in Findings No. 35.

4. The plaintiffs' motion to allow Glen Farrier to be made a plaintiff is denied.

5. The Court denies Arkansas-Best Freight System, Inc.'s motion to set aside the liability findings or to apportion damages among the defendants according to their relative faults.

SUPPLEMENTAL MEMORANDUM

The plaintiffs object to the master's damage findings with respect to plaintiffs Derrington, Middleton and Caldwell. They argue that these individuals are entitled to pro rata damages for loss of a bid run after May 13, 1977 in addition to an allowance of pro rata damages from the date of the change of operations until February 22, 1977.

On February 22, 1977, plaintiff Patterson bid and was awarded a bid run from Little Rock, Arkansas, to Wheatley, Arkansas. Under Company policy, once a driver is awarded a bid run, he is obligated to hold that bid run for a year. An

exception to the Company policy occurs when a bid run has been cancelled one time a week for four consecutive weeks. A driver may then elect to cancel the bid run and return to the extra board. The bid run may then be re-bid. On April 26, 1977, Patterson cancelled the bid run in accordance with Company procedure for personal reasons. It is conceded that Patterson would have held the bid run throughout the remainder of the damage period if he had wanted it. Caldwell, Derrington and Middleton were running extra board after the change of operations and all had more seniority than Patterson. They Voluntarily chose not to bid for the Wheatley run on February 22, 1977. It is conceded that they would have been awarded the run because of their greater seniority if they had bid. In light of their voluntary refusal to bid and the fact that they would have retained the run throughout the remainder of the damage period, the master determined that they should not receive damages after February 22, 1977, although when the run was re-bid on May 13, 1977, it was awarded to an individual with higher seniority than either Caldwell, Derrington or Middleton.

The master was correct in using February 22, 1977 as the cut-off date for damages. Neither Caldwell, Derrington nor Middleton had a reasonable expectation of obtaining the Wheatley run after February 22, 1977 since bids were ordinarily awarded for a one year period. They voluntarily gave up the run to Patterson, an individual with lower seniority. Thus, they did not lose a bid run as a result of the change of operations, but voluntarily chose not to accept one. The Court notes, moreover, that Derrington, Caldwell and Middleton voluntarily elected not to bid for the Wheatley run on May 13, 1977.

Arkansas-Best has moved to set aside the finding of liability or, in the alternative, to amend the Court's findings to apportion damages among the defendants according to fault. The labor defendants agree that there is no basis for awarding damages against any defendant, but oppose the motion to apportion damages.

Arkansas-Best argues, in essence, that it should not be held liable because it had little or no involvement in the conduct upon which the Court based its liability findings, and the conduct that it was involved in was undertaken in good faith reliance on the decision of the contractual arbitration process. All of the defendants contend that since the decision to seek a change of operations was not improperly motivated and since the result reached by the change of operations committee was a permissible one that they should be exonerated from liability.

The Court disagrees with Arkansas-Best's characterization of its role in the change of operations procedure. Its role was not one of mere good faith passive acquiescence in the committee's decision. Arkansas-Best aggressively sought the change and, in furtherance of its plan, sought out members of the change of operations committee prior to the hearing in an attempt to secure their approval. This conduct was sufficient to constitute a violation of the collective bargaining agreement. The Court has previously considered and disposed of the argument that there can be no liability if the result was a permissible one under the contract in its memorandum incorporated in the Findings of Fact and Conclusions of Law. No useful purpose would be served by reiterating the analysis here. Thus, the Court denies Arkansas-Best's motion to set aside the liability findings.

The Court likewise denies Arkansas-Best's motion to apportion damages among the defendants according to their relative faults. Each of the violations set forth in the Court's Findings of Fact and Conclusions of Law, standing alone, is sufficient for supporting the Court's remedy. This Supplemental Memorandum is incorporated in the Supplemental Findings of Fact and Conclusions of Law.

A final judgment will be entered in accordance with the Findings of Fact and Conclusions of Law, and the Supplemental Findings of Fact and Conclusions of Law.

Dated June 21, 1979

Civil No. LR-75-C-330

JUDGMENT
AND
ORDER

FILED
JUNE 25, 1979

In accordance with the Findings of Fact and Conclusions of Law filed on July 20, 1978, and the Supplemental Findings of Fact and Conclusions of Law filed contemporaneously herewith,

IT IS HEREBY ORDERED:

That plaintiffs are entitled to judgment against defendants. The following plaintiffs are entitled to monetary damages in the following amounts:

J. Barnhouse	$ 7,000.00
W. D. Rogers	5,000.00
C. Cooper	5,000.00
G. Kirkland	8,000.00
L. Barrentine	2,400.00
W. Coble	3,000.00
R. Moore	1,500.00
A. Skidmore	4,200.00
K. Alsip	1,400.00
N. McDonald	3,000.00
J. Scates	1,500.00
Bechtel	1,105.77
Blanton	5,175.18
Brewington	8,708.56
Burgess	3,454.90

Caldwell	2,932.70
Carr	3,130.00
Cockrum	869.94
Derrington	4,584.90
Dye	3,192.66
Ellis	3,808.44
Gray	1,766.88
Griffin	5,497.40
Healea	1,786.85
Howard	1,703.70
Jefferson	7,404.66
Kauffman	7,761.14
Lemay	12,719.56
Lindquist	1,632.00
McDonald	3,065.58
Marshall	5,627.70
Mason	2,700.54
Mauldin	9,547.93
Middleton	2,932.70
Milam	2,019.23
Moyer	2,840.30
Patterson	3,999.56
Richards	2,720.48
Runyan	3,400.24
Shaw	89.00
Cleveland Smith	3,295.98
Stanton	1,841.14
Stapleton	205.02
Thomason	4,142.50
H. Thompson	841.50
Wells	612.36
Robinson	1,764.15
Kinsey	4,284.66
Arman	931.86
Carter	1,000.98
Daniel	4,063.50
Davidson	4,098.78
Halstead	1,878.12
Hammock	2,225.70

Keeney	5,094.18
Matthews	409.68
Reaves	6,274.80
Wetherington	1,028.61
Williams	3,100.68
Wilson	7,135.74
Garner	469.00
Deaton	2,459.52
Brewer	378.76
Edwards	5,942.88
Ghent	4,688.44
Wheeler	6,002.10
Burkett	5,000.00
Hamby	5,000.00
Hawkins	8,131.32
Lovell	8,388.32

The plaintiffs are also entitled to the equitable relief specified by the Court in Findings No. 35 of the Findings of Fact and Conclusions of Law.

IT IS FURTHER ORDERED:

That the master's fee and the associated costs of the master's proceedings will be taxed 50% to plaintiffs and 50% to defendants. All other costs will be taxed to the defendants.

Dated: June 21, 1979.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1580

Glenn P. Kirkland, Lloyd Barrentine, R. C. Moore, W. D. Rogers, Charles W. Coble, Robert Jones, C. L. Allen, Jim Lovell,

Appellees,

v.

Arkansas-Best Freight Systems, Inc.; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters and Central States Conference of Teamsters,

Appellants.

Appeals from the United States District Court for the Eastern District of Arkansas.

No. 79-1620

Glenn P. Kirkland, Lloyd Barrentine, R. C. Moore, W. D. Rogers, Charles W. Coble, Robert Jones, C. L. Allen, Jim Lovell,

Appellees,

v.

Arkansas-Best Freight Systems, Inc.,

Appellant.

Submitted: February 13, 1980
Filed: August 25, 1980

Before LAY, Chief Judge, BRIGHT and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

This is a labor case involving the interstate trucking business that was decided adversely to the defendants in 1979 by the United States District Court for the Eastern District of Arkansas.* Two appeals were taken; those appeals have been consolidated and considered together.

The formal plaintiffs are Glenn P. Kirkland, Lloyd Barrentine, R. C. Moore, W. D. Rogers, Charles W. Coble, Robert Jones, C. L. Allen and Jim Lovell, who are over the road truck drivers who are or have been employed by the corporate defendant, Arkansas-Best Freight Systems, Inc. (ABF), which is an interstate motor carrier of freight. Three labor organizations are also named as defendants; they are the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Teamsters or the International Union, the Southern Conference of Teamsters, and the Central States Conference of Teamsters. Named as individual defendants originally were Frank E. Fitzsimmons, General President of the International Union; Roy L. Williams, Roy Lane and W. C. Smith, who in 1975 were union employees and representatives. However, in the course of proceedings in the district court the case was dismissed as to the individual defendants.

Plaintiffs sued individually and on behalf of a large number of other ABF drivers who held employment in Arkansas prior to the change of operations that was jointly approved by management and labor in 1975.

*The Honorable Gerald W. Heaney, United States Circuit Judge, sitting as a district judge by designation.

Plaintiffs alleged that the change in operations that has been mentioned has had an adverse economic impact on them; that the change in operations was permitted in violation of law and in violation of underlying collective bargaining agreements between interstate truckers, including ABF, the Teamsters and the two Teamster regional Conferences that have been identified; that the change in operations committee that finally approved ABF's third proposal for a change was not properly constituted; that the proceedings before the committee were not fairly and properly conducted; and that the labor representatives on the committee failed to represent fairly individual truck drivers. Certain other charges were also made which we find it unnecessary to mention.

The suit was filed on October 30, 1975 which was very soon after the challenged change in operations had been approved and probably before it had been implemented to any substantial extent, if at all. The relief sought by plaintiffs was primarily injunctive. In due course the defendants answered and denied that plaintiffs were entitled to any relief.

Subject matter jurisdiction was properly based on section 301 (a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (a).

Although the complaint prayed for both preliminary and injunctive relief, the prayer for preliminary relief was never brought into focus before the district court,[1] the docket of which was extremely congested at the time and was to become more so.

The case was finally tried without a jury in December, 1977, and a voluminous record was compiled. In July, 1978 findings of fact, conclusions of law and memorandum opinion

[1]The case was assigned originally to the late District Judge Terry L. Shell. After his death, the case was reassigned to Chief District Judge G. Thomas Eisele, and then ultimately assigned to Judge Heaney.

dealing with the basic issues between the parties were filed. By that time ABF's change of operations had been put into effect and had had whatever adverse impact on Arkansas drivers that it was going to have.[2]

The trial judge found that the drivers in question were entitled to relief. In the situation with which he was confronted he concluded that while some former Little Rock drivers were or might be entitled to some equitable relief, basically, the relief granted should be accrued monetary damages sustained by the affected drivers to the date of trial. No awards of future damages were made. Liability for imposed damages was held to be joint and several.

As to accrued damages, the trial court prescribed a formula for the calculation of such damages and made awards in favor of twelve drivers who had presented damage evidence to the court.

With respect to other drivers the trial judge called on counsel to try to stipulate as to amounts due respective drivers, and indicated that if counsel could not agree a special master would be appointed to assess individual damages. *See* Fed. R. Civ. P. 53(b).

The parties were not able to agree, and on November 27, 1978 the matter of damages was referred to Robert F. Fussell, Esq. of the Little Rock bar, an experienced and cap-

[2]While we will return to the subject later, we pause to note at this point that in 1975 ABF was operating in about twenty-five states and had terminals in various cities throughout the country. Some of those terminals were located in the Southern Conference area and others were located in the Central States Conference area. In Arkansas ABF operated one terminal at Little Rock and another at Fort Smith in the Southern Conference area. The change here challenged involved shift of ABF's operational emphasis from the Southern Conference area to the Central States Conference area. The result was a loss of driver positions at both Little Rock and Fort Smith; after the change had been implemented ABF ceased to maintain its Fort Smith terminal. The Little Rock terminal has remained operational.

able attorney, with directions to assess certain damages in accordance with the formula set out by the trial judge in his original findings of fact. Detailed instructions as to particular drivers were given to Master Fussell.

After an evidentiary hearing the master made his determinations and incorporated them into a report that he filed with the court on March 15, 1979.

On June 25,1979 the district court filed supplemental findings and conclusions in which it adopted the report of the master. On the same day a final judgment was entered which, in addition to the limited equitable relief that has been mentioned, made monetary awards to seventy drivers in varying amounts totalling $258,868.78.

Notices of appeal were timely filed.

I.

For reversal, the "labor defendants" contend that since the district court found that the change of operations of ABF was not impermissible under the collective bargaining agreements, the district court fell into fundamental error in failing to dismiss the case in its entirety; that the district court erred in holding that the labor defendants owed any duty of fair representation to the truck drivers; that the district court erred in finding that such duty, if it existed, had been breached; that no damages should have been awarded to plaintiffs; that in any event the damages awarded are too speculative to stand scrutiny; and that the labor defendants should not be held jointly and severally liable with ABF for damages that resulted from the approval of a change of operations proposed by ABF.

ABF in arguing for reversal generally makes in obverse the same arguments that are advanced by the labor de-

fendants. As to joint and several liability, ABF contends that it should not be held jointly and severally liable with the labor defendants, and ABF contends alternatively that in any event damages should have been apportioned between it and the labor defendants in proportion to fault.

It goes without saying that the plaintiffs contend that there was no error in the holdings of the district court, and that the judgment of that court should be affirmed.

II.

From the standpoint of labor relations the interstate trucking industry is highly organized and highly unionized. The dominant International Union, and the one involved here, is the Teamsters Union and its subordinate organizations, including ultimately local unions affiliated with it.

For labor relations purposes, the country is divided into "conference areas." One of those areas is the Southern Conference area that includes Arkansas and a number of other southern states. Another is the Central States Conference area made up of a number of northern and midwestern states, including Missouri and Ohio.

During, prior to and after 1975 interstate truckers and the Teamsters were parties to what is known as the National Master Freight Agreement. In addition, truckers were parties to agreements between them and the respective area Conferences of the Teamsters. Since ABF was operating in both the Central States Conference area and the Southern Conference area, it was evidently a party to agree-ments with both Conferences. All of those agreements were basic agreements relating to fundamental labor relations problems in the trucking industry. Those agreements did not purport to deal with individual employees of individual truckers.

At the local level, individual employees are represented

for collective bargaining and other purposes by local unions affiliated with the International Union. Subject to prescribed limitations, it is the function of the locals to negotiate collective bargaining agreements with individual employers, to process employee grievances, and in general to give fair representation to employees who may stand in need of representation.

It is safe to say that in most, if not all, Teamster collective bargaining contracts the principle of seniority is recognized. There are, however, different types of seniority.

To start with, there is "terminal seniority" which prevails in the Central States Conference area. Under that system an employee has seniority only at the terminal at which he is employed.

At the other end of the scale there is "system seniority" which is recognized in the Southern Conference area. Under that system an employee can exercise seniority rights at any point in his employer's system, at least within the same Conference area.

A variant is "modified" system seniority which is also recognized in the Southern Conference area. Where that arrangement is in force, an employee can exercise system seniority but only if he is unable to hold his position at his base terminal.

The trucking business is not static, and at times a trucking company finds it necessary or desirable to make a change in its operations. Such a change may affect adversely individual drivers from the standpoint of seniority or otherwise. The change may involve shifts of employees from one point to another in the same Conference area or it may involve shifts from one Conference area to another.

The underlying agreements with which we are concerned provided that a proposed change in operations had

to be approved by a "Change of Operations" committee made up of equal representatives of labor and management. If only one Conference area was involved, the representatives were to come from the same area. If more than one Conference area was involved, both areas were to be equally represented.

III.

In 1975 ABF desired to make a substantial change in its operations so as to shift emphasis from terminals in the Southern Conference area to terminals in the Central States Conference area, principally to the terminal located in Dayton, Ohio.

ABF did not find it easy to obtain "Change of Operations" committee approval of its proposal, and it had to withdraw the first two plans that it submitted. The third plan was approved in September, 1975, and was put into effect.

The first committee consisted of two employer representatives and two union representatives. The employer representatives were Hal Franke from the Central States Conference and M.B. Harp from the Southern Conference. The Union representatives were Roy Lane from the Central States Conference and W.C. Smith from the Southern Conference. It will be recalled that both Lane and Smith were named as parties defendant in this case. As to M.B. Harp, it is to be observed that he owned 1213 shares of stock in a holding company identified as ABC which had a subsidiary interest in ABF.

The second committee consisted of three employer and three union representatives. The employer representatives were R. Pulliam for the Southern Conference, B. Braziel for the Central States Conference, and K. Skaggs for the Eastere States Conference. On the union side, the Southern Conference was represented by W. C. Smith; the Central States Conference was represented by K. Rittman, and the

Eastern States Conference was represented by W. Neidig.

It will be observed that the consists of those two committees confirmed to the requirments of the underlying agreements.

A substantially different situation existed with respect to the third committee that finally approved ABF's modified plan. On both sides of the table the Central States Conference area was represented by two people and the Southern Conference area was represented by only one. That unbalanced consist was in complete violation of the collective bargaining contracts. Additionally, it appears that from the union standpoint the Southern Conference was represented by W. C. Smith, and that the Central States Conference was represented by Roy Lane and R. Fularczyk who seems to have done nothing but sit in his chair. From the employer's standpoint the committee was made up of Hal Franke and Wayne Henderson from the Central States Conference and by M. B. Harp, who has been mentioned, from the Southern Conference.

The district court refused to accept the testimony of Lane and Smith to the effect that unbalanced committees in a situation of this kind had been sanctioned by custom and usage. The trial judge also found that Lane was strongly partisan on behalf of the Central States Conference and dominated the proceedings, and that Smith, the representative of the Southern Conference, took no active part in the proceedings and simply read a newspaper and smoked a cigar during the committee sessions.

The district court also found that a labor relations employee of ABF, Don Little, actively lobbied Lane and Smith in advance of the meeting for their support of the proposal, that Little took up the matter with employer representative Franke and that Franke assisted Little in the preparation of the change proposal that was presented to the committee.

The district court also found that due to his ownership of ABC stock, M. B. Harp had a conflict of interest that rendered it improper for him to serve on the change of operations committees involving ABF.

IV.

The district court held that the particular change of operations that the third committee approved was not, in and of itself, impermissible, and that it would have been permissible had the committee been properly constituted, had its proceedings been fairly conducted, and had a complete record of the proceeding been made, all as required by the underlying contracts, the relevant provisions of which are set out in full in the district judge's findings of fact.

The district court found and concluded, however, that the conditions just indicated had not been met, that the committee was unbalanced in favor of the Central States Conference, that Harp's membership on the committee was improper, that Lane impermissibly dominated the proceedings, and that Smith as labor representative of the Southern Conference was a complete cipher and made no effort to play an active or intelligent role in the proceedings. The district court also found that while the committee was required to have a complete transcript of the proceedings made, that was not done, and that the transcript that was prepared was subject to certain significant omissions. Further, as we have seen, the court found that the ABF employee, Little, lobbied the labor members of the committee, Lane and Smith, and also lobbied Central States Conference management representative, Franke, and secured Franke's assistance in the preparation of the third change of operations plan that was finally approved.

In view of the defect in the make-up of the committee and of the procedural defects that have been

outlined, the district court was of the opinion that the action of the committee was in violation of the National Master Freight Agreement, the two supplementary Conference agreements, and the procedural provisions set out by the National Grievance Committee established by the NMFA.

The district court also held that ABF and the labor defendants were jointly and severally liable for the violations that brought about final approval of the change of operations involved in this case.

In general we agree.

In doing so, we recognize at the outset that change of operations committees provided for in contracts between the Teamsters and trucking companies are not courts and that proceedings before such committees are not "judicial proceedings." Those observations, however, do not answer the question before the district court and before us.

It is clear from the materials before the court and mentioned by Judge Heaney in his findings and conclusions that the parties to the agreements in question bound themselves to follow certain procedures in connection with employer proposed changes of operations. We think that as far as third parties who might be adversely affected by a particular change in operations were concerned, the International Union and the employer seeking the change were required to follow the procedures on which they had mutually agreed. We are also satisfied that individual truck drivers, like the plaintiffs in this case, adversely affected by a change of operations improperly approved have standing to challenge the change in an action brought under section 301 [a] of the Taft-Hartley Act.

It is contended that an international union like the Teamsters and its Conference subordinates owes no duty

of "fair representation" to individual members of local unions affiliated with the Teamsters. We think it fair to say that an international union does not owe a personal duty of fair representation to a member of a local union or to an individual employee of the same kind or to the same extent that the local union owes such a duty to an individual employee in a conventional field of conflict between that employee and his employer.

But it must be kept in mind that one of the purposes of the change of operations committees is to protect ultimately the rights of individual employees, and we think that those employees have at least the right to insist that procedural safeguards that the International Union and members of the trucking industry imposed on themselves be observed. And that was not done in this case.

V.

Turning now to a discussion of the propriety of the remedies prescribed by the district court, there are some preliminary observations to be made.

The first proposed change of operations put forward by ABF involved the shifting of business away from terminals that were maintained in Fort Smith and Little Rock, Arkansas, Atlanta, Georgia, and Cape Girardeau and St. Louis, Missouri. Arkansas and Georgia are in the Southern Conference area, whereas St. Louis and Cape Girardeau, Missouri are in the Central States Conference area; another terminal maintained by ABF is in Kansas City on the western border of Missouri.

The first plan called for the elimination of 68 jobs in all of the terminals that have been mentioned, except Kansas City. Little Rock and Cape Girardeau were the hardest hit with a loss of 18 jobs at each place. Fort Smith came next with a loss of 14 jobs; and Atlanta, Georgia and St. Louis, Missouri were both

affected adversely in that each of those terminals would lose 9 jobs.

The "gaining terminals" were Cincinnati and Dayton, Ohio, Asheville, North Carolina, Indianapolis, Indiana, and Kansas City, Missouri. Sixty-one positions were to be shifted to those terminals.[3]

The big gainer under this plan was Dayton, Ohio that was to pick up 40 jobs; Cincinnati came next with a gain of 9. Asheville was to pick up 3 jobs; Indianapolis was to gain 8; and Kansas City was to gain 1.

The proposed change was vigorously resisted by the Little Rock, Fort Smith, Cape Girardeau and St. Louis locals because of significant job losses that would be suffered at the cities just mentioned. Roy Lane also objected to the proposal, and the district court found that Lane was the dominating member of the committee. Lane, W. C. Smith and others suggested changes in the proposal be made, and the original proposal was withdrawn.

A second proposed change was submitted to a new committee and is discussed in the district court's Finding of Fact No. 15. Under that proposal drivers employed at the affected terminals would be permitted to make "paper bids" for runs out of other terminals without actually having to move their residences. The same local unions that had opposed the first plan also opposed the second, and the Kansas City local likewise objected. That plan was withdrawn.

The third and final approved plan affected 50 rather than 68 positions. By far the heaviest losers were Little Rock [25] and Fort Smith [14]. Cape Girardeau's loss under the third plan [6] was much less than its loss under the first plan [18], and the St. Louis loss

[3]It would seem that the plan involved the simple elimination of seven positions.

was reduced from 9 to 5.

Again, Dayton, Ohio was the big gainer (38). Cincinnati and Indianapolis gained 5 positions each, and Kansas City gained 2. The Atlanta terminal which was a loser under the first plan, and the Asheville terminal that was a gainer under the first plan do not appear to have been affected one way or the other by the third plan.

Quite obviously, any change of operations on the part of ABF, no matter how fairly and reasonably considered, which shifted jobs from points west of the Mississippi River to points east of that river and north of the Ohio River was bound to affect adversely drivers employed at the "losing terminals". A driver employed at one of the "losing terminals," if he did not have enough seniority to hold his job at his original terminal after the reduction in force, would either have to go to a layoff status or seek work elsewhere within the employer's system.

The district court specifically found that under the final plan drivers at Little Rock and Fort Smith were not permitted to "follow their work" to St. Louis and Cape Girardeau. That meant that, ignoring Kansas City, adversely affected drivers who did not want to be laid off would have to move to Dayton, Cincinnati or Indianapolis. At those terminals former Arkansas drivers would lose their "system seniority" and "modified system" seniority and would be governed by the "terminal seniority" in force in the Central States Conference area.

A driver who was required to move in order to keep his job might lose a regular run at the old terminal, and he might find difficulty in obtaining regular work at the new terminal with the difficulty being due in part to the "terminal seniority system" in the Central States Conference area. Additionally, the driver would incur moving and relocation expenses. However, under the terms of the NMFA the employer was required to bear those expenses.

Having made those general comments, we will proceed to a discussion of the specific relief granted by the district court.

VI.

As we have said, the district court awarded some limited equitable relief and very substantial monetary relief.

The court dealt with equitable relief in Finding of Fact No. 35. On this phase of the case the plaintiffs had contended that the change of operations decision should simply be set aside, and that the status quo be restored. Defendants had contended that the status quo be maintained initially, that a new committee should be selected, and that the new committee should have the power to retain, amend or set aside the existing change of operations decision. The district court found that for various reasons neither approach was equitable, and rejected both of them. We accept the court's determination.

The trial judge then prescribed his own equitable relief which was as follows:

> In light of the above, it is the order of the Court that plaintiffs who had accepted a transfer to a terminal other than Little Rock shall be given an opportunity to transfer to Little Rock whenever a vacancy occurs on the Little Rock board. The parties shall agree to reasonable procedures for notifying the plaintiffs of these vacancies and their manner of acceptance, and shall submit these procedures to this Court within thirty days of the date that final judgment is entered herein.
>
> Plaintiffs shall be given the opportunity to return to Little Rock in order of their seniority, but no plaintiff shall have more than one opportunity. On returning to Little Rock, the plaintiffs shall be given a position on the Little Rock seniority board commensurate with their total seniority with Arkansas-Best. Expenses incurred

in such retransfer shall be borne by the defendants in accordance with the principles heretofore established. Upon retransfer to Little Rock, employees will have their Southern Conference modified seniority restored to them.

We have no trouble with that award and approve it. Our real trouble is with the respective awards of monetary damages.

The district court found that when the change of operations went into effect the Little Rock terminal employed 150 drivers, 18 of whom were layoff status. The court found that as of the time in question there were 25 vacancies in the Central States Conference area with most of them being at Dayton. Twenty-five drivers were given the opportunity to bid into the "master active pool" and then into a Central States terminal. Twenty-one Little Rock drivers transferred to the Central States Conference area and four were placed in a layoff status.

Under the modified system of seniority that prevailed in the Southern Conference area, affected Forth Smith drivers had three choices: (a) they could accept layoff status, remain in Fort Smith and hope to be recalled to duty; (b) they could transfer into the Central States Conference area; or (c) they could "bump" into any other terminal in the Southern Conference area where junior men were employed. Twelve of the 14 affected Fort Smith drivers bumped into the Little Rock terminal which required the displacement of an equal number of Little Rock drivers. Those men had the choice of being laid off or transferring into the Central States Conference area.

The trial judge placed the affected employees into two categories: drivers who did and did not transfer out of Little Rock or Fort Smith to other terminals in the Central States Conference area or in the Southern Conference area.

With respect to drivers who transferred, the court fixed

their damages at sums representing unreimbursed moving expenses without any regard to any increases in earnings achieved by the transferring drivers.

As to drivers who did not transfer out of Little Rock or Fort Smith and who were laid off, the district court found that they were entitled to damages based on a detailed formula which the district court established. The court then made awards to eleven specific drivers and found that one driver who had undertaken to establish a damage claim was not entitled to anything. The awards ran from $8,000.00 for one driver to zero. The lowest award affirmatively made was $1,400.00. The other awards were in varying amounts between $8,000.00 and $1,400.00.

In its order of reference filed on November 27, 1978 the district court first found that ten identified plaintiffs were not entitled to any damages. They have not undertaken to appeal from that ruling, and we accept it.

The court then proceeded to refer the claims of several different groups of plaintiffs to the special master with directions to the master to make findings as to the individual members of the respective groups of plaintiffs affected by the reference. The district court announced that it would hold a hearing on December 22 to pass on the claims of four plaintiffs whose claims had not been referred to the master; and the order contained some minor provisions that are not in controversy here.

The special master proceeded with diligence to discharge the duties of his reference, and he conscientiously followed the instructions that he had received from the district court. The master made awards in favor of a number of the drivers and rejected the claims of others.

The damage situation was summed up in supplemental findings of fact, conclusions of law, and opinion filed on June 25, 1979; final judgment was rendered on the same

day. The report of the special master was in all respects approved.

The special master awarded damages totalling $127,117.00. The ultimate award of the district court, expressed in the final judgment, was $258,868.78. That award included the awards made by the court in its initial findings of fact and conclusions of law and also included the awards made by the special master.

The defendants attack those awards. They contend, first, that plaintiffs proved no breach of the collective bargaining agreements and for that reason are not entitled to damages. We do not accept the premise that the plaintiffs failed to show a breach of the agreements. That matter has been discussed already.

Alternatively, and more cogently, the defendants contend that assuming a breach of contract plaintiffs have failed to show that they sustained any damages as a proximate result of the particular breaches of contract found by the district court. For that reason, defendants say, the awards were basically "speculative". The defendants also say that the individual awards, when considered in connection with the several categories of damages set out in the trial judge's original findings and in his order of reference, are too speculative in stand scrutiny.

We have given this phase of the case careful consideration and are forced to the conclusion that the defendants are correct in their contention that the plaintiffs failed to prove damages caused by the errors in connection with the proceedings before the change of operations committee which the district court found to have been in violation of the NMFA and the respective Conference agreements.

It is clear from the record that ABF had a right to change its operations by the shift of operational emphasis that has been discribed. It is also clear that any such change in operations would necessarily involve the transfers of drivers

out of Little Rock and Fort Smith, and that a number of Little Rock Drivers would have to move to the Dayton terminal in order to retain work.

It was inevitable that the change would have adverse economic impacts both on the transferring drivers and on the drivers who remained behind. Such impacts would have taken place if the committee that approved ABF's third proposal had been properly constituted and if it had proceeded with exemplary fairness. There is no evidence that the affected drivers were damaged any more by the action of the committee that in fact approved the third proposal than they would have been damaged had the third proposal been given fair consideration by a properly constituted committee, and if ABF had refused to permit its employee, Little, to lobby the committee members, and if M.B. Harp had not participated in the final proceedings.

The trial judge conceded that the change of operations in question would have been permissible had it been properly considered and approved. He assumed, however, that a properly organized and functioning committee could have come up with a different change of operations plan and one that, presumably, would or might have been more advantageous to the drivers.

There is no substantial evidence that would support the assumption of the district court, and we agree with the defendants that when the trial court indulged that assumption and acted in reliance on it, it engaged in improper speculation and fell into clear error.

We might observe that, as the district court suggested, much of the trouble in this case has been due to the lapse of more than two years between the filing of the suit and its trial. Had the plaintiffs been able to obtain from the district court preliminary relief prohibiting ABF from implementing its change of operations pendente lite, the problem could have been solved with relative ease. The trial court could simply have directed that ABF's proposal be submitted

to a new committee properly constituted and acting in a fair and rational manner. Such a preliminary order might have restricted membership on the new panel, and the preliminary order might have prohibited ABF from engaging in unfair and sub rosa lobbying activities. When the case finally came before Judge Heaney the defendants suggested that the approach just described be taken. We agree with the district court that by December, 1977 and thereafter the suggested disposition of the case had become unfeasible and that it would have been inequitable for the court to undertake to put the scattered eggs back into the original basket.

Apart from the award of damages, the judgment of the district court is affirmed. To the extent that the judgment awarded monetary damages, the judgment is reversed, the awards vacated, the cause remanded to the district court for further proceedings consistent with this opinion.

The record before us, including the docket entries of the clerk of the disrict court, does not show affirmatively that the district court has ever fixed the fee of the special master. That should now be done. The master's entitlement to a fee is not dependent on the district court's awards of damages, nor is it affected by vaction of those awards.

Affirmed in part; reversed in part and remanded.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1580

September Term, 1980

Glenn P. Kirkland, Lloyd Barrentine, R.C. Moore, W.D. Rogers, Charles W. Coble, Robert Jones, C.L. Allen, Jim Lovell,

Appellees,

vs.

Arkansas-Best Freight Systems, Inc.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters and Central States Conference of Teamsters,

Appellants.

No. 79-1620

Glenn P. Kirkland, Lloyd Barrentine, R.C. Moore, W.D. Rogers, Charles W. Coble, Robert Jones, C.L. Allen, Jim Lovell,

Appellees,

vs.

Arkansas-Best Freight Systems, Inc.,

Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

Petition of appellees for rehearing filed in these causes having been considered, it is now here ordered by the Court that the same be, and it is hereby, denied.

October 6, 1980

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1580

September Term, 1979

Glenn P. Kirkland, Lloyd Barrentine, R.C. Moore, W.D. Rogers, Charles W. Coble, Robert Jones, C.L. Allen, Jim Lovell,

Appellees,

vs.

Arkansas-Best Freight Systems, Inc.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters and Central States Conference of Teamsters,

Appellants

Roy L. Williams, Roy Lane and W.C. Smith, Union rep. on the Multi Conference (Central/Southern) change of operations committee and Frank E. Fitzsimmons, Union Committee Chairman and General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

No. 79-1620

Glenn P. Kirkland, Lloyd Barrentine, R.C. Moore, W.D. Rogers, Charles W. Coble, Robert Jones, C.L. Allen, Jim Lovell,

Appellees,

vs.

Arkansas-Best Freight Systems, Inc.,
Appellant

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters and Central States Conference of Teamsters, Roy L. Williams, Roy Lane and W.C. Smith, Union rep. on the Multi Conference (Central/Southern) change of operations committee and Frank E. Fitzsimmons, Union Committee Chairman and General President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Appeals from the United States District Court for the Eastern District of Arkansas.

These Causes came on to be head on the designated record of the United States District Court for the Eastern District of Arkansas and briefs of the respective parties and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in these causes be, and the same is hereby,

affirmed in part and reversed in part in accordance with the opinion of this Court.

And it is further ordered by this Court that these causes be, and they are hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court.

Costs taxed in favor of Appellees: August 25, 1980

Costs of five copies of brief: $127.90

Total costs of Appellees for recovery from Appellants in the U.S. District Court $127.90

A True Copy:

Attest:

Clerk, U.S. Court of Appeals, 8th Circuit.
October 20, 1980

No. 80-893

In the Supreme Court of the United States

October Term, 1980

GLENN P. KIRKLAND, ET AL.,
Petitioners,

vs.

ARKANSAS-BEST FREIGHT SYSTEM, INC.; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN CONFERENCE OF TEAMSTERS and CENTRAL STATES CONFERENCE OF TEAMSTERS,
Respondents.

BRIEF OF RESPONDENT, ARKANSAS-BEST FREIGHT SYSTEM, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In attempting to create an issue for review, petitioners have misstated the basis for the Eighth Circuit's vacation of their damage award as involving an uncertainty in petitioners' proof of the amount of their damages. As the following demonstrates, the Eighth Circuit vacated the damage awards because petitioners failed to prove that their damages were proximately caused by the conduct found to have been in violation of the collective bargaining agreement. Thus the proper question before this Court is as follows:

1. Does plaintiffs' failure to prove the *fact* that their harm was proximately caused by the breach of contract preclude the recovery of damages in suits brought under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a)?

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STATEMENT OF THE CASE

Petitioners' statement of the case contains an outline of the basis upon which the lower courts found and affirmed liability, but fails to mention the findings which the Eighth Circuit concluded necessitated reversal of the damage awards. Although it affirmed the finding that the contract had been breached, the Eighth Circuit vacated all of the district court's damage awards because it could find no evidence that the breach of contract had proximately caused petitioners' harm. In so doing, the Eighth Circuit concluded that petitioners' losses were the inevitable result of a contractually proper change of operations, which would have occurred even if there had been no breach of contract.

For this reason, petitioners' statement of the case must be expanded as follows to include a discussion of the nature of the losses for which the district court awarded damages and the relationship, if any, of these damages to the breach of contract.

In late 1975, Arkansas-Best Freight System, Inc.[1] (hereinafter "ABF") exercised its undisputed contractual right to change its operations by closing its Fort Smith, Arkansas domicile and transferring approximately 40 driver positions from Fort Smith and Little Rock, Arkansas to Dayton, Ohio.[2] As part of the change of operations, all of the affected drivers at Fort Smith and Little Rock were given the opportunity to transfer to Dayton and retain their full seniority. The seniority system in effect at Little Rock and Fort Smith gave the Fort Smith drivers the additional option of transferring to Little Rock with full seniority retention.[3] The change of operations recognized

---

1. Arkansas-Best Freight System, Inc. is a wholly owned subsidiary of Arkansas-Best Corporation. Neither corporation has any subsidiary or affiliated corporations other than wholly owned subsidiaries of Arkansas-Best Corporation.

2. The change of operations was actually more complicated, involving 8 locations and 50 driver positions, as follows:

Losing Terminals		Gaining Terminals	
Little Rock	−25	Dayton	+38
Fort Smith	−14	Cincinnati	+5
St. Louis	−5	Indianapolis	+5
Cape Girardeau	−6	Kansas City	+2

For purposes of this controversy, which only involves claims of drivers at the Little Rock and Fort Smith locations, the change can be simplified to considering only these domiciles and Dayton.

3. By vote of ABF's employees, "modified system seniority" was in effect at ABF's southern conference domiciles. This seniority system permitted an employee, who was unable to work at his present domicile, to transfer with full seniority to any other ABF domicile in the southern conference. Because all three of ABF's proposed changes called for the closing of the Fort Smith domicile, all three proposals were required to and did recognize the modified system seniority rights of the Fort Smith drivers.

this additional right. When the change of operations was actually implemented, 12 Fort Smith drivers declined to exercise their rights under the change of operations and instead exercised their seniority right to transfer to Little Rock. Because these transferees had greater seniority than the drivers who remained in Little Rock, the Fort Smith drivers' exercise of their seniority right caused a reduction in the relative position of the Little Rock drivers on their seniority roster. This reduction in seniority position adversely affected the quantity and quality of the Little Rock drivers' work assignments, which are determined on a seniority basis.[4]

For purposes of the damage awards, the district court divided the plaintiffs into two classes: (1) those who had transferred as a result of the change of operations, and (2) those who had not. The former group was awarded damages representing unreimbursed moving expenses.[5] The latter group, which comprised 67 of the 70 damage awards, was awarded damages for the inconvenience and

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4. Each of the 12 Fort Smith transferees had sufficient seniority to entitle him to one of the top 20 positions on the Little Rock seniority roster. Thus the vast majority of the incumbent Little Rock drivers were lowered 12 seniority positions. As a result, they were unable to secure certain of the more lucrative work assignments which were awarded to the Fort Smith transferees on a seniority basis.

5. Only one individual, who relocated to Dayton as part of the change of operations, remained as a plaintiff. This individual had already been reimbursed for his moving expenses as required by the contract. He sought and was awarded damages for additional relocation expenses, such as increased home mortgage payments, which were not reimbursable under the contract. Individuals who transferred to Little Rock in exercise of their unique seniority right were not compensated for moving expenses because this transfer was not made as part of the change of operations and thus did not qualify for reimbursement under the contract. Two such individuals, however, sought and received damages for their moving expenses. Consequently, the damages awarded to the plaintiffs in this group represented compensation for expenses which were not recoverable under the collective bargaining agreement.

loss of earnings resulting from their inability to secure the work assignments to which their seniority position had entitled them prior to the transfer of the Fort Smith drivers into Little Rock.[6]

The district court's damage awards clearly represent compensation for the adverse impact of the change of operations itself. The breach of contract, on the other hand, was not the change of operations but rather certain procedural irregularities in the manner in which the contractually proper change of operations was approved. The district court created a causal connection between the adverse impact of the change and the procedural irregularities by "assum[ing] that a properly organized and functioning committee could have come up with a different change of operations plan and one that, presumably, would or might have been more advantageous to the drivers." (Petitioners' Appendix (hereinafter "P.A.") at A52)

The Eighth Circuit vacated the damage awards because it could find "no substantial evidence that would support the assumption of the district court." (*Id.*) According to the Eighth Circuit, "ABF had a right to change its operations by the shift of operational emphasis that has been described." (*Id.* at A51) "[A]ny such change in operations would necessarily involve the transfers of drivers out of Little Rock and Fort Smith." (*Id.* at A51-52) "It was inevitable that the change would have ad-

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6. There was clearly no uncertainty as to the method to be used in calculating the amount of these damages. The district court ordered that individuals be compensated at the rate of 18¢ per mile for the difference between the miles driven in the two years immediately following the change and the mileage driven in the year immediately preceding the change. In addition, the district court awarded $2,500 per year to each individual who had involuntarily been required to accept a work assignment with variable starting times.

verse economic impacts both on the transferring drivers and on the drivers who remained behind." (*Id.*) Recognizing that the change of operations under any circumstances would have adversely affected petitioners, the Eighth Circuit examined the record to determine the extent, if any, to which this inevitable impact was caused by the procedural irregularities which constituted the breach of the agreement. The Eighth Circuit, however, found "no evidence that the affected drivers were damaged any more by the action of the committee that in fact approved the [change] than they would have been damaged had the [change] been given fair consideration by a properly constituted committee . . . ." (*Id.*) Thus, the Eighth Circuit concluded that petitioners' harm was the inevitable result of contractually permissible conduct, *i.e.*, the change of operations itself, and was not "a proximate result of the particular breaches of contract found by the district court." (*Id.* at A51)

REASON FOR DENYING THE WRIT

When considered in light of the Eighth Circuit's actual holding, it is apparent that the petition for certiorari does not present an issue deserving of review by this Court and should consequently be denied. An examination of the petition clearly indicates that petitioners are relying upon the erroneous premise that the Eighth Circuit vacated the damage awards due to an uncertainty as to the amount of the damages. Thus, in the first question presented, petitioners state the issue as involving "uncertainty as to the *amount* of damages." In the second question, petitioners assume that the damages at issue were "brought about by wrongdoing." In the third question, petitioners continue with their assumption that "they have proven liability and the existence of damages."

In so stating the issues, petitioners have mischaracterized the actual holding of the Eighth Circuit, which vacated the damage awards, not because of any uncertainty as to the amount thereof, but because petitioners had failed to prove the fact that their losses had been proximately caused by the breach of contract. As the Eighth Circuit noted in addressing the damage issue:

> The defendants contend that assuming a breach of contract plaintiffs have failed to show that they sustained any damages as a *proximate result* of the particular breaches of contract found by the distirct court
>
> . . . .
>
> We have given this phase of the case careful consideration and are forced to the conclusion that the defendants are correct in their contention that the plaintiffs failed to prove damages *caused* by the errors in connection with the proceedings before the change of operations committee which the district court found to have been in violation of the NMFA . . . .

(P.A. at A51) Clearly, the Eighth Circuit's concern was not with petitioners' failure to prove the amount of their damage but rather with their failure to prove that the breach of contract proximately caused them any damage at all.

When it is recognized as it must be, that the Eighth Circuit was concerned with the question of causation, it is clear that the petition for certiorari has attempted to create a basis for review by misstating the holding of the lower court. When the Eighth Circuit's holding is properly stated, it is apparent that the decision does not "conflict with the decision of another federal court of appeals on the same matter" and does not depart "from the accepted and usual course of judicial proceedings . . . ." Sup. Ct. Rule

17.1. For this reason the petition presents no issue worthy of review by this Court and should therefore be denied.

The cases cited by petitioners actually acknowledge, rather than conflict with, the principle upon which the Eighth Circuit based its vacation of the damage awards. Thus, in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), this Court noted that "there is a clear distinction between the measure of proof necessary to establish the *fact* that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes recovery of uncertain damages applies to such as are not the certain result of the wrong,* not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (Emphasis added) Likewise, it has been recognized that "[t]he *Bigelow* [*v. RKO Radio Pictures*, 327 U.S. 251 (1946)] rule that uncertainty as to the *amount* of damages is to be cast on a wrongdoer does not extend to uncertainty as to the *fact* of damages." *Simon v. New Haven Board & Carton Co.*, 516 F.2d 303 (2d Cir. 1975). Clearly, this Court has long recognized that where the plaintiff fails to establish that the breach of contract proximately caused the harm of which he complains, he is not entitled to recover.

The remaining cases cited by petitioners, *Bangor & A. R. Co. v. Brotherhood of Loc. Fire. & Eng.*, 442 F.2d 812 (D.C. Cir. 1971) and *Espaillat v. Berlitz Schools*, 383 F.2d 220 (D.C. Cir. 1967), do not conflict with the Eighth Circuit's holding because neither case involved a situation where the plaintiff had failed to prove that the defendant's conduct had in fact been the cause of the damages awarded. In *Bangor*, the union sought to recover the wages, assessments and union dues that would have been paid by the railroad either to or on behalf of those individuals who

would have been employed had the railroad not breached its contractual obligations. There was no question but that the railroad had breached its agreement and, more significantly, that the breach had resulted in fewer firemen being employed. The railroad avoided any liability for unpaid wages because "in general the law has not yet come to the point of awarding judgments on unjust enrichment for the benefit of a suitor who has not established any harm to himself." 442 F.2d at 821. The court upheld a judgment for unpaid dues and assessments despite the railroad's claim that it was impossible to determine the *amount* of the loss because some of the firemen who would have been hired might have joined a different union. The language, which petitioners assert conflicts with the Eighth Circuit's decision in this case, refers solely to the burden of the parties to prove or disprove the *amount* of the admitted damage. For the reasons noted by this Court in *Story Parchment, supra,* this language has no applicability to a situation where, as here, the proof failed to establish the *fact* that defendant's conduct had proximately caused petitioners' harm. Likewise, in *Espaillat,* the defendant had unquestionably induced the plaintiff to enter into a contract which defendant had then refused to complete. The issue on appeal was not whether defendant's conduct had proximately caused the plaintiff damages, but rather the manner in which the plaintiff was to prove the amount of the damage admittedly caused by the defendant's conduct.

The rule that governs disposition of this case and which was followed by the Eighth Circuit Court of Appeals was stated long ago in *James Wood Gen. Trad. Estab. v. Coe,* 297 F.2d 651 (2d Cir. 1961):

> Damages cannot be based on speculation. The difficulty of measuring and appraising the amount, once

> it is clear that actual damage has been sustained, is another matter. *Where, as here, the existence of any damage whatever would have to be a matter of guesswork, no recovery is allowed* . . . .
>
> Where actual damage depends on an exercise of discretion, and there is no evidence from which it can reasonably be determined how such discretion would be exercised, no damages are recoverable.

Id. at 658 (emphasis added). In reality, petitioners' harm was the inevitable result of ABF's contractually permissible decision to close its Fort Smith domicile. This decision in turn created the Fort Smith drivers' seniority right to transfer to Little Rock. A properly constituted committee operating in strict accord with the procedural rules could not have prevented the closing of the Fort Smith domicile. Neither could such a committee have prevented the Fort Smith drivers from exercising their seniority rights to transfer to Little Rock. Yet it was this transfer, which would have occurred regardless of the breach of contract, that caused petitioners' harm. Moreover, even if one were to ignore the realities of the situation and to assume, as the district court improperly did, that a proper committee in its discretion could have reached a different result, there is clearly "no evidence from which it can reasonably be determined how such discretion would be exercised . . . ." Without knowing what result might have occurred, any determination of damages would have to be a matter of guesswork. Thus, no damages would be recoverable and the Eighth Circuit properly vacated their award.

For the preceding reasons, petitioners' other points are of no consequence when considered in light of the actual holding of the Eighth Circuit. The opinion does not in any way cast doubt on the ability of an individual em-

ployee to obtain relief under § 301 of the LMRA. The Eighth Circuit opinion merely holds that an employee may not redress, under § 301 of the LMRA, injuries which were not caused by the contractually impermissible conduct but instead were the inevitable consequence of contractually permissible actions. Likewise, the Eighth Circuit's opinion does not shift to plaintiff the burden of disproving an affirmative defense. Under § 301, as is the general rule, plaintiff has always had the burden of establishing a causal connection between the damages claimed and the breach of contract. *Electrical Workers v. Foust*, 442 U.S. 42, 48-49 (1979); *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005 (3d Cir. 1977).

CONCLUSION

When petitioners' motion for a writ of certiorari is examined in light of the lower court's actual holding, it is clear that the writ is predicated upon a misconception and should, therefore, be denied. The motion asserts that the writ should be granted because the Eighth Circuit erred by vacating the damage award for uncertainty as to the *amount* thereof. It is apparent, however, that the Eighth Circuit vacated the awards because of uncertainty as to the *fact* that petitioners were damaged as a result of the breach of contract. The law clearly provides that the plaintiff must prove with certainty the fact that he was damaged. A review of the record clearly indicates that the Eighth Circuit was correct in holding that petitioners had failed to prove that the inevitable impact of the permissible change of operations in *fact* resulted from the conduct constituting

the breach. The lower court was clearly correct and the writ of certiorari should be denied.

Respectfully submitted,

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January 2, 1981

No. 80-893

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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v.

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA; SOUTHERN
CONFERENCE OF TEAMSTERS; CENTRAL STATES
CONFERENCE OF TEAMSTERS,
Respondents.

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QUESTION PRESENTED

Respondents would state the issue as follows: Are employees who challenge an award made by an arbitral committee entitled to recover damages for procedural irregularities that occurred during the hearings, notwithstanding a finding that the award itself was a permissible one under the collective bargaining agreement?

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CONFERENCE OF TEAMSTERS; CENTRAL STATES
CONFERENCE OF TEAMSTERS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 629 F. 2d 538 (8th Cir. 1980), while the order denying rehearing is not yet officially reported. (Pet. App. A54).[1] The opinion of the District Court is reported at 475 F. Supp. 180 (E.D. Ark. 1979).

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[1] References to "Pet App." are to the Appendix to the Petition for a Writ of Certiorari in this matter.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 25, 1980. Petitioners' petition for rehearing was denied on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portion of the Labor-Management Relations Act of 1947 is § 301, 29 U.S.C. § 185, which is adequately set forth in the petition at page 3.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioners, truck drivers employed by Defendant, Arkansas-Best Freight System, Inc. ("ABF"), and domiciled in Arkansas, are members of Teamsters Local Unions in Little Rock (Local 878) or Fort Smith (Local 373), Arkansas.

Petitioners sued ABF and the International Brotherhood of Teamsters ("IBT") and two of its affiliates, the Central Conference of Teamsters ("Central") and the Southern Conference of Teamsters ("Southern"),[2] claiming that their seniority and other rights provided in the National Master Freight Agreement ("NMFA") had been violated by ABF's movement of certain freight operations from Arkansas to Northern terminals, principally in Ohio. The claim was that ABF had violated the NMFA, and that IBT, Central and Southern had violated a duty of fair representation.

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[2] This brief in opposition is filed on behalf of the three respondent labor unions, who shall be referred to collectively hereinafter as union respondents.

Trial was to the court whose findings and conclusions stated that the change of operations was "not impermissible"[3] and that the change of operations committee "has the duty to resolve questions of seniority and domicile fairly and in good faith";[4] but that established rules of procedure were not followed. Judgment was for petitioners against ABF, IBT, Central and Southern for specified amounts totalling $258,868.78.

On appeal, the United States Court of Appeals for the Eighth Circuit agreed that the ruling of the change of operations committee was permissible and affirmed the district court's finding of joint liability[5] for the procedural irregularities (Pet. App. A44). However, the court vacated the awards of monetary damages and simply awarded petitioners their costs because petitioners "failed to prove damages caused by the errors in connection with the proceedings before the change of operations committee" (*Id.* A51) and because "[t]here is no evidence that the affected drivers were damaged any more by the action of the committee that . . . approved the . . . [change of operations] proposal than they would have been damaged had the proposal been given fair consideration by a properly constituted committee (*Id.* A52).

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[3] Pet. App. A15. This curious phrase, coined by the district court, is no less than a judicial determination that the committee's decision did not breach the contract.

[4] Pet. App. A15.

[5] The issue of liability of the unions for the alleged procedural irregularities is addressed in our cross-petition filed on this date.

II. The Pertinent Facts

A. The "Change Of Operations" and the Collective Bargaining Agreement

The NMFA[6] is a nationwide collective bargaining agreement which specifies the wages, hours and working conditions — including seniority rights — which employees of signatory motor carriers must receive. Unions and employees seek to freeze as many conditions as possible for the term of the contract.

Management, on the other hand, insists that the motor freight industry cannot be static; the changing nature of the economy, the varying demands of shippers, the mobility of industry which results in changing patterns of concentrations of customers, and improvements in highways and in equipment all contribute to the necessarily volatile nature of the motor freight industry.

These competing employer vs. employee interests are accommodated in the NMFA by a series of provisions relating, on the one hand, to employees acquiring and maintaining seniority status and job seniority,[7] and, on the other, the employer's absolute right "to designate home domiciles and the operational requirements of the business."[8]

Preservation of both the employees' seniority rights and the employer's right to designate home domiciles and determine

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[6] Where we refer to "NMFA" unless otherwise indicated throughout the brief, we include the applicable area supplement. The agreement at issue herein covered the period July 1, 1973 to May 31, 1976.

[7] See NMFA, Art. 5, §§ 1-7 (Pl. Ex. 1, pp. 18-27); and Southern Supplement at Art. 42, §§ 1-6 (P. Ex. 1, p. 95 ff); see district court's Finding No. 7 (Pet. App. A3-A6).

[8] NMFA, Art. 8, § 6 (Pet. App. A4-A6).

operational requirements is the function of a committee established pursuant to Article 8, § 6, which provides:[9]

> Present terminals, breaking points or domiciles shall not be transferred or changed without the approval of an appropriate change of operations committee. Such committee shall be appointed in each of the Conference Areas, equally composed of employer and union representatives. The change of operations committee shall have the authority to determine the seniority of the employees affected and such determination shall be final and binding.
>
> * * *
>
> The Committee shall observe the employer's right to designate home domiciles and the operational requirements of the business.

After reviewing these provisions in detail, the district court held: "[T]he interpretations given to these clauses of the agreements by the change of operations committee were not impermissible ones given the board authority of the committee". (Pet. App. A15). And the particular change at issue here was, as the district court found, "to the economic advantage of the company".[10] Indeed, the court reiterated its prior statement: "...the Change of Operations Committee has broad authority... *the decision arrived at was a permissible one.* (Pet. App. A22 (emphasis supplied)).

Nevertheless, the district court determined that certain activities, taken pursuant to normal and customary change of operations determinations, justified a finding of breach of the duty of fair representation and the large damage award which the Eighth Circuit vacated.

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[9] Note that the parties stipulated that the NMFA is lawful: "there is no issue here as to the validity of these agreements, and the parties agree that these agreements were legally negotiated". Stipulation; Pre-Trial Order, p. 11, § 3(c)(iii).

[10] Accordingly, the court stated, "...it will not be necessary for you to introduce any proof as to...whether or not this was a desirable move on the part of the company". (Trial Transcript, p. 1180).

B. The ABF Change Of Operations

In May of 1975, ABF, "faced with mounting problems brought about by change in the flow of freight resulting from purchase of additional operating authority, adding new market areas, and stronger competition",[11] decided to "put [its] road operations at the headhaul which requires that the workload at various domiciles be changed".[12] Accordingly, ABF proposed to move drivers from South to North[13] — i.e., where the freight originated — at the "headhaul". Upon union objections at the hearing, the original proposal was withdrawn;[14] as was an amended proposal presented in July.[15] A further amendment resulting in a third proposal was later presented and approved after a hearing held in Chicago in September, 1975.[16] This change, which became effective in November, 1975, reduced employment by 50 in two Southern and two Central terminals, and increased the driving staff by 50 in the North.[17] The contractual seniority rights of all were protected — but movement South to North (while balancing fifty losses vs. fifty gains)[18] adversely affected the work schedules of plaintiffs, and resulted

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[11] Defendant's Exhibit 4, p. 217.

[12] *Ibid.*, at 218.

[13] The proposal (see Pet. App. A8) would have resulted in the elimination of seven jobs.

[14] The withdrawal was pursuant to the committee ruling to "refer it back to the parties". (D. Ex. 4, p. 354).

[15] Pet. App. A11.

[16] Pet. App. A11-12; D. Ex. 8 and 9; cf. TR 1639 ff.

[17] The specific gains and losses are set forth at Pet. App. A12.

[18] The original ABF proposal eliminated 68 jobs while adding only 61. See Pet. App. A8.

in redomicile of many of them.[19] As we have already pointed out, the district court held that this decision "was a permissible one", and within the "broad authority" of the change of operations committee. Pet. App. A22.

As stated in the NMFA, the committee has no power to tamper with "the employer's right to designate home domiciles and the operational requirements of the business".[20] ABF had the right to change its operations.[21] The committee's only power is "to determine the seniority of the employees affected".[22]

The district court granted damages not because the activity which it considered procedurally irregular had caused damage, but because, in the view of the district court, otherwise "employees would have no way of requiring their union to represent them fairly or of requiring change of operations committees to follow agreed-upon procedures". (Pet. App. A24).

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[19] Generally, the movement was: 14 Fort Smith drivers were given the option to exercise modified system seniority (Pet. App. A7) and move elsewhere in the South in the ABF system.

The diminished work load in Little Rock meant that lesser seniority drivers there had the options to bid into a "Master Active Pool" from which the gaining terminals were to be staffed, to move elsewhere in the ABF system in the South in accordance with their modified seniority, or to be laid off pending recall in Little Rock when business there warranted.

[20] NMFA, Art. 8, § 6, Pet. App. A5.

[21] The Eighth Circuit recognized that right: "It is clear from the record that ABF had a right to change its operations by the shift of operational emphasis". Pet. App. A51.

[22] NMFA, Art. 8, § 6, Pet. App. A4.

REASONS FOR DENYING THE WRIT

I. Neither The Decision Nor The Record Below Raises The Questions Presented In The Petition.

Petitioners' statement of the questions is designed to erect and demolish strawmen. Actually, petitioners' failure to obtain damages was not a result of failure to ascertain the amount of damages with certainty; nor is the failure a result of a misplaced burden of proof. Rather, as the court of appeals explicitly held: "There is no evidence that the affected drivers were damaged any more by the action of the Committee that in fact approved the...proposal than they would have been damaged had the...proposal been given fair consideration by a properly constituted committee." (Pet. App. A52).

We have seen in the factual statement above that neither "uncertainty as to the amount of damages",[23] nor "shift[ing] of the burden of pro[of],[24] nor decisions as to the propriety of "affirmative defenses"[25] have anything to do with the court of appeals' vacating the damage award. Rather, the court found that the alleged irregularities in the proceedings of the arbitral body did not cause any damage. Accordingly, petitioners' statement of the questions — indeed, petitioners' entire exposition of reasons for granting the writ — addresses matters not decided by or presented to the court of appeals.

The simple holding is that procedural irregularities by an arbitral committee established by a collective bargaining agreement do not justify a damage award where the substantive decision is consistent with and warranted by the agreement, and provides the only seniority protection specified in the contract.

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[23] Pet., Questions Presented, No. 1.

[24] *Id.*, No. 4.

[25] *Id.*

II. The Court Of Appeals Correctly Applied The Law To The Undisputed Facts.

The committee's award protected both the contractual seniority rights of petitioners and the contractual rights of the employer to change employees' domicile. Accordingly, the court of appeals was clearly correct when it held, Pet. App. A51-52:

> "...the defendants are correct in their contention that the plaintiffs failed to prove damages caused by the errors in connection with the proceedings before the change of operations committee which the district court found to have been in violation of the NMFA and the respective Conference agreements.
>
> * * *
>
> The trial judge conceded that the change of operations in question would have been permissible had it been properly considered and approved. He assumed, however, that a properly organized and functioning committee could have come up with a different change of operations plan and one that, presumably, would or might have been more advantageous to the drivers.
>
> There is no substantial evidence that would support the assumption of the district court, and we agree with the defendants that when the trial court indulged that assumption and acted in reliance on it, it engaged in improper speculation and fell into clear error".

There is no claim that the committee's decision deprived any person affected by ABF's move to the North of seniority selection rights; further, the drivers who redomiciled as a result of the change of operations received all contractual benefits, including moving and lodging expenses, to which they were entitled.[26] Thus, the court of appeals rejected the district court's

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[26] See Pet. App. A6 for a listing of those benefits.

conclusion that awarding damages herein was necessary in order to have a deterrent effect upon union misconduct and found that the damages awarded were not tied to any of respondents' activities.

The court's vacation of the damages below was consonant with sound principles established by this Court. In *Electrical Workers* v. *Foust,* 442 U.S. 42, 60 L. Ed. 2d 698 (1979), this Court rejected an award of punitive damages in a suit for breach of the duty of fair representation. The Court categorically rejected plaintiff's arguments that a deterrence rationale supported the awarding of punitive damages without regard to the actual damages suffered primarily because "[t]he fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights". 442 U.S. at 48-49. Thus, because the Court sought "to avoid burdening unions beyond the extent necessary to compensate employees for their injuries", 442 U.S. at 50, it held as follows:

> "Because general labor policy disfavors punishment, and the adverse consequences of punitive damage awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Accordingly, we reverse the judgment below insofar as it upheld the award of punitive damages". 442 U.S. at 52.

Thus, in *Foust,* in Judge Blackmun's opinion,

> "the Court adopt[ed] a per se rule that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be". 442 U.S. at 52-53 (Blackmun, J., concurring).

Applying the rationale of *Foust* to the case at bar, respondents submit that the district court erred as a matter of law by awarding non-compensatory damages against them and

that the Eighth Circuit corrected that error by vacating the awards. The district court did not award damages to petitioners to compensate them for breach of the NMFA; rather, the court acknowledged that the committee's decision was a permissible one. Thus, although all of the drivers were treated fairly and in accordance with their seniority, although the change of operations was a "permissible" change within the terms of the agreement, and although the redomicile of the employees was properly administered in accordance with seniority, the district court awarded damages in order to deter future misconduct, not to compensate employees for harm caused by any violation of their contractual rights. That award constituted reversible error. See *Cronin* v. *Sears, Roebuck & Co.,* 588 F. 2d 616 (8th Cir. 1978); *Butler* v. *Teamsters Local 823,* 514 F. 2d 442, 447 (8th Cir.), *cert. denied* 423 U.S. 924 (1975); *St. Clair* v. *Teamsters Local 515,* 422 F. 2d 128, 132 (6th Cir. 1969).

Further, the cases cited by petitioners lend no comfort to their position since petitioners have simply failed to establish the essential fact of damage as a result of procedures used by the committee as opposed to the extend of the damage. See *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931); *Bangor & A. R. Co.* v. *Brotherhood of Loc. Fire & Eng.,* 442 F. 2d 812, 820-823 (D.C. Cir. 1971).

In summary, respondents respectfully submit that the Eighth Circuit was correct as a matter of law in refusing to award any damages to the petitioners. Since the result reached by the change of operations committee was permissible and correct under the contract, petitoners have suffered no damages for which they must be compensated. They have received every contractual benefit to which they were entitled based upon a reasoned and contractually correct committee decision.

CONCLUSION

The petition presents an atypical case of no great significance. The true issue in this case is one tied to the particular facts of this litigation — whether any causal connection between "wrongful" activity and damage exists.

Petitioners suffered no damage caused by any breach of the contract or any procedures employed by the change of operations committee. The district court's plain error in awarding damages of a punitive nature has been corrected by the Eighth Circuit. Therefore, the petition should be denied.

Respectfully submitted,

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